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No. 20074

IN THE

# United States Court of Appeals
# For the Ninth Circuit

K-91, Inc.,
*Appellant,*
v.
Gershwin Publishing Corporation, et al.,
*Appellees.*

Appeal from the United States District Court for
The Western District of Washington,
Northern Division

Honorable Gus J. Solomon, *Chief Judge*

## BRIEF OF APPELLANT

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METROPOLITAN PRESS, SEATTLE

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## BRIEF OF APPELLANT

### STATEMENT DISCLOSING JURISDICTION

The United States District Court for the Western District of Washington, Northern Division, the trial court, had jurisdiction of this cause by virtue of the Judiciary and Judicial Procedure Act, 28 U.S.C.A. §§ 1337 and 1338.

The complaint of appellees (R. 1) discloses that appellees were the owners of copyrights to musical compositions alleged to have been infringed by appellant and that the appellees sued the appellant under the Copyright Act, 17 U.S.C.A. §§ 1 and 101, for infringement seeking damages and injunctions.

The appellant answered (R. 4) alleging the appellees were misusing their copyrights, including the copyrights in question in violation of public policy and Sections 1 and 2 of the Sherman Act, U.S.C. §§ 1 and 2, and, therefore come into court with unclean hands, and were barred from receiving relief. Appellant also counterclaimed (R. 4) for damages and injunctive relief pursuant to the Federal Rules of Civil Procedure, Rule 13(a), 28 U.S.C.A., Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

This appeal is from a final judgment rendered in the United States District Court for the Western District, Northern Division, against appellant (R. 11). This court has jurisdiction to review such judgment by virtue of the Judiciary and Judicial Procedure Act, 28 U.S.C.A. § 1291.

## STATEMENT OF THE CASE

### The Nature of the Action

Appellees, owners of copyrights to certain musical compositions, filed actions against three radio broadcasting stations and an individual officer and stockholder of one of them, claiming violations of the federal copyright law. Appellees seek damages for infringement and injunctions restraining future infringement of their copyrighted works, as well as attorney fees and costs.[1]

The appellants admitted that the musical compositions named in appellee's complaints were performed on its

1. In a period of eighteen months appellees and other members of ASCAP brought 15 separate suits against 11 radio stations in Washington, alleging 272 separate copyright infringements (R. 30, Fact 40, p. 8). The minimum statutory damages demanded was $68,000 and the maximum demanded was $1,360,000, plus attorneys fees and costs. Several of these suits were settled before trial, several settled after trial, and the present one was appealed.

radio station without first obtaining a license to perform them, but it contended that the copyright owners were misusing their copyrights in violation of public policy and state and federal laws and are themselves barred from maintaining their actions and entitled to no relief. Specifically the appellant claimed appellees illegally extended their copyrights, appellees' method of doing business was in violation of the Sherman Antitrust Act (15 U.S.C.A. §§ 1-7), and appellees violated the Constitution and the laws of the State of Washington, Chapter 218, 1937 Session Laws (RCW, Chapter 19.24). Appellant contended that by reason of "unclean hands" the copyright owners have neither legal nor equitable standing to maintain their actions.

The alleged improper use of the copyrights and violations of the antitrust laws were also the basis of a counterclaim filed by the appellant wherein the appellant sought treble damages and orders enjoining the copyright owners from further misuse of their copyrights, pursuant to Rule 13(a) of the Federal Rules of Civil Procedure and Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26).

The district court found that the copyright owners had not unlawfully extended their copyrights or violated either the federal antitrust laws or the laws of Washington State, and that their actions were not barred by reason of "unclean hands." As the appellant did not contest the infringements of the musical copyrights, the district court granted the appellees injunctions, damages and counsel fees.

Subsequent to the lower court's decision, the actions involving two of the corporate radio station defendants and the individual defendant were settled and satisfactions of judgments were entered (R. 49, Settlement Agreement). The action involving one of the corporate radio stations, K-91, Inc., was not settled and the defendant elected to appeal.

**The Appellant**

The appellant operates a radio station with the call letters KIXI, located in Seattle, Washington, pursuant to a license granted by the Federal Communications Commission (R. 37, Fact 3, Tr. 15-16).

Seattle is the hub of a major metropolitan area. KIXI is one of 14 radio stations and five commercial television stations competing in the market. There are also scores of movie theatres in the Greater Seattle-Tacoma metropolitan area. In addition there are hundreds of night spots, restaurants, hotels, theatres, symphonies and other establishments which perform music as a part of their public offerings. The appellant and the defendants who chose not to appeal broadcast only a special style of programming which requires a pre-selected kind of music. This music style is described or characterized in broadcasting circles as "good music" programming or playing "standards" (Tr. 8-11). Appellant never broadcasts western, hillbilly, rock and roll or jazz (Tr. 9). It seldom broadcasts religious music, but relies almost exclusively on popular standards and light classical styles. The kind of sound the station tries to project to attract and hold its audience is of extreme importance and the selection of music therefore is critical (Tr. 9, 171, 210). The greatest source of the kind of music appellant needs is controlled by the licensing agency of which appellees are members (Tr. 165, 205, 273). The appellant must be able to broadcast this music to remain in business (Tr. 165, 205, 246, 273, 314) (R. 37, Fact 18).

## The Nature of the Copyrights

The Copyright Act of 1909 defines the various rights granted to copyright owners. Among these are the right of mechanical reproduction or the recording right (e.g. phonograph records) and the right to perform the work publicly for profit (e.g. radio broadcasts). The performance right is the primary right involved herein. It is distinct from the right to print sheet music, or the right to record music on records or on motion picture films. The latter is called in the trade a synchronization right. It will be seen later that both recording and synchronization rights are licensed differently from performance rights.

Broadcasters are not the only ones needing performance rights. Movie theatres need the rights when a sound-recorded film is shown. Night clubs perform music for profit, as do symphonies, theatres, restaurants, hotels, private clubs, dance halls, skating rinks, cocktail lounges, etc. (Tr. 5). All perform music extensively and all must be licensed. Appellees license performance rights to broadcasters on a pooled basis and in bulk. This is accomplished by assignment of the music performing rights to the American Society of Composers, Authors & Publishers (R. 37, Facts 20, 21).

## The American Society of Composers, Authors and Publishers

### *The Nature of ASCAP*

ASCAP is a voluntary association which was organized in 1914 for the purpose of licensing the public performance of musical compositions of which the members owned the copyrights. It was felt that a large organization with nationwide coverage could police for infringements, and if any were detected, ASCAP would attempt to get the infringer to take a blanket license covering all of the works of its combined members. If the infringer refused, ASCAP would have a suit filed for infringement. (For background, see *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. 888 (1948) at 891.)

The procedure was then and still is that each member assigned to ASCAP all its non-dramatic performing rights of its copyrighted musical compositions (R. 37, Fact 21, Def. Ex. A-4). The sums ASCAP collected from license fees were and still are kept in a common fund and the proceeds are divided, less expenses, at regular intervals (R. 37, Fact 20, Def. Ex. A-3). The appellees have assigned each of the compositions alleged infringed to ASCAP and these were in turn deposited in the pool. In fact, all the performance rights which are owned by a member of ASCAP must be assigned to ASCAP for mutual licensing (R. 30, Fact 18, p. 5; R. 37, Fact 20, Def. Ex. A-4).

> "The performing rights pool thus licensed by ASCAP encompasses the predominate bulk — estimated at times to be from 85 to 90 per cent — of the popular and classical music of this country and not passed into the public domain. To this must be added the copyrighted music of some 40,000 foreign

> composers and authors, whose respective national performing societies have authorized ASCAP to license their compositions for performance in the United States." Timberg, *The Antitrust Aspects of Merchandising Modern Music,* 19 Law and Contemp. Problems, 294, 297 (1954). See also Justice Black, dissenting in *Gibbs v. Buck,* 207 U.S. 66 at 81 (1939); *Buck v. Swanson,* 33 F. Supp. 377, 386 (D. Neb. 1939); *Buck v. Gallagher,* 36 F. Supp. 405 (WD Wash. 1940.)

By the 1930s when radio stations first began to acquire economic significance, ASCAP had virtual control of all copyrighted music published in the United States. *Watson v. Buck,* 313 U.S. 406 (1940); *Alden-Rochelle v. ASCAP,* 80 F.Supp. 888 (SDNY. 1948); *Alden-Rochelle v. ASCAP,* 80 F.Supp. 900 (SDNY. 1948).

Today ASCAP is an association of over 8,800 members comprising both writers and publishers (R. 37, Fact 16; R. 30, Fact 11, p. 3). It controls more than a million musical compositions in its performing rights pool (R. 30, Fact 12, 13). Three music licensing organizations in the United States license the non-dramatic performing rights of substantially all of the copyrighted works in the United States today. ASCAP is one of these three, and more than 50% of all performances of copyrighted music broadcast in the United States are licensed by ASCAP (R. 37, Fact 18).

In 1962 ASCAP collected almost 35 million dollars from license fees. Over 30 million dollars came from broadcasters. Revenue from all other licenses was a little over 4 million dollars (R. 30, Fact 49, p. 9). More than 87% of ASCAP's total revenue is derived from license fees paid by broadcasting stations and networks, and less than 13% from all other users of music combined (R. 30, Fact 48,

p. 9). In the State of Washington 100% of ASCAP's collections are from broadcasters and ASCAP collects nothing from other music users (R. 30, Fact 21, p. 5).

ASCAP is governed by a board of directors of twenty-four members, twelve are selected by the publishers and twelve by the composers and authors (R. 30, Fact 24, p. 6; Def. Ex. A-4). Each twelve determines how to share revenues among its respective side. From this determination there is a right of appeal to a Board of Appeal, and from its decision an appeal may be taken to the full board of directors (Def. Ex. A-4). (See Schmel and Krasilovsky, *The Business of Music,* 94-101 (1964).)

The performance rights to some music in ASCAP's repertory is vastly more valuable than the rights to other music in the ASCAP repertory and of all the millions of musical compositions copyrighted very few become hits or of any significant value. This is also true of the music written by the appellees (R. 30, Fact 83, p. 14). Notwithstanding this, the revenues pooled and distributed by ASCAP to its members from fees are not and cannot be segregated to determine how much money is allocated to any particular composition (R. 30, Fact 84, p. 14). Nor can ASCAP's distributions be allocated to a particular area or state (R. 30, Fact 85, p. 14).

The fee to be quoted for any license is initially determined by the ASCAP board of directors as distinguished from its members. The board of directors also determines the form of the license and the basis upon which a fee is to be charged (R. 24, Fact 24, p. 6).

### *ASCAP Licenses*

ASCAP licenses broadcasting stations under only two types of licenses, one of which is named "Blanket" and the other "Per Program" (R. 30, Fact 22, p. 4; Def. Ex. A-9). Both are bulk licenses or blanket licenses of ASCAP's entire repertory.

> "ASCAP licenses only the pooled aggregate of the performing rights assigned to it by its members, i.e., its entire repertory . . . Its licenses always convey a blanket authorization to the licensee to use its entire repertory; it never licenses the right to perform individual pieces, or individual publisher's catalogues, or any part of its total repertory." Timberg, *Ibid.* at 297.

As ASCAP's chief counsel, Herman Finkelstein, explains:

> "ASCAP is an association of composers, authors, and publishers of musical works banded together for the purpose of licensing the public performance rights of their works on a bulk basis. . . ." Finkelstein, The Composer and the Public Interest, 19 Law and Contemp. Problems 275, 283 (1954).

Both licenses required by ASCAP grant radio stations the right to use all of ASCAP's million or so copyrights on "local radio programs," which are defined to mean programs "other than a network radio program" (Def. Ex. A-9). Under both licenses the station must pay fees based on a percentage of the gross revenues of the station, plus a sustaining fee (R. 30, Fact 23, p. 5; Def. Ex. A-9). No other forms of licenses are offered (R. 30, Fact 25, p. 6).

Under the license described as a "Local Station Blanket License" a fee is charged upon revenues received by the station from all local radio programs, including those which use no ASCAP music whatsoever (Def. Ex. A-9).

Under the type described as "Local Station Per Program License," the station pays to ASCAP a fee based upon revenues received from programs which use ASCAP music. The fees charged for the Blanket License are 2.125% of the gross revenues of the radio station (Def. Ex. A-9). The fees charged for the Per Program License are 8% of the gross (Def. Ex. A-9).

Of the over 5,000 commercial stations licensed by the Federal Communications Commission and broadcasting in the United States today, fewer than 60 to 100 have elected to use the Per Program License. None are using it in Washington State (R. 30, Fact 57, 62, p. 11).

Broadcasting networks are also licensed by ASCAP (Def. Ex. A-10). The networks collect fees from affiliated stations for music on network programs broadcast over the affiliate and pass the fees on to ASCAP (R. 30, Pretrial Order, Admission 1, p. 1). These fees are in turn distributed to ASCAP's members (R. 30, Pretrial Order, Admission 2, p. 1). Therefore, it is not necessary for a station to have a separate license to play music which is supplied from networks because the performance rights are cleared for the affiliated stations at the source (R. 30, Fact 59, p. 11). This type of licensing is sometimes called "clearance at the source."

### *ASCAP's Washington Licensing Practices*

Except for a short period of time in and around 1959, ASCAP has been engaged in issuing performance licenses in the State of Washington (R. 30, Fact 19, p. 5). The licenses are mailed by ASCAP from New York City, signed by the music user in this state, thence returned for signature by ASCAP in New York (R. 30, Fact 19, p. 5). ASCAP receives license fees from broadcasters in Washington and in turn distributes the fees to its members. Therefore, each of the appellees herein has been paid and received and will continue to be paid and receive royalty compensation and other consideration from broadcasters located in Washington (R. 30, Fact 20, p. 5). Significantly, however, broadcasting stations are the only users of music located in the state from whom ASCAP collects fees (R. 30, Fact 21, p. 5). Furthermore, the appellees collect no fees from any other users located in this state. Other commercial users of music like theatre exhibitors, night clubs, bowling alleys, taverns, restaurants, etc., have not been paying fees in Washington State, but broadcasters have (R. 30, Fact 21, p. 5).

The only licenses offered to broadcasters in Washington State are blanket type licenses (R. 30, Facts 25, 26, 28, 44; Def. Ex. 7-8a, Pl. Ex. 6). Yet ASCAP offers to all other users of music in Washington, except broadcasting stations, licenses where fees are charged for performances of specific compositions, i.e. per piece licenses (R. 30, Facts 25, 26, 43; Def. Exs. 7-8a, Pl. Ex. 6). But as stated above, no fees are collected from these other users.

In 1958, all ASCAP radio licenses expired on the common date of December 31, 1958. Consequently, in 1959 after expiration of the 1958 licenses, ". . . ASCAP refused to offer licenses to any broadcasters located in the State of Washington" (R. 30, Fact 73, p. 13). With this source of music cut off completely, broadcasters in Washington faced the prospect of infringement suits or closing down for lack of music (Tr. 165, 205, 246, 273, 314). This forced stations to negotiate with ASCAP for business. After several months of negotiating, many stations and ASCAP agreed to a compromise. Accordingly, a petition was filed in the United States District Court for the Southern District of New York asking the court to enter an order (R. 30, Fact 73, p. 13; R. 37, Fact 40). The petition was filed and an order entered on the same day, November 20, 1950. Being a negotiated instrument, the order was entered by stipulation and agreement of the parties (R. 30, Fact 74, p. 13). It directed ASCAP to issue licenses in one of two agreed forms for the period January 1, 1959, through December 31, 1963 (R. 37, Facts 43, 44; Pl. Exs. 11, 12).

Appellant was apprised of the proceedings described above, but did not sign a license on the ground that it was illegal to do so and because the Washington law provided:

> ". . . All licensees of any violator of this chapter shall be deemed as aiders and abettors. RCW 19.24.-100 (Def. Exs. A-13, A-14, A-50).
>
> "Every person . . . who violates or who procures, aids or abets in violating of any provision of this chapter . . . or who procures, conspires with, or aids or abets any person or persons in his or their future to obey the provisions of this chapter . . . shall be deemed guilty of a gross misdemeanor, and upon conviction shall be punished by a fine . . . or imprisonment . . ." RCW 19.24.290.

Furthermore, appellant had been advised by counsel and was of the firm belief that ASCAP and its members constituted a combination in restraint of trade, and ASCAP's members were misusing their copyrights in violation of the federal copyright and antitrust laws (Tr. 202, 205, 206, 251, 252, 299, 301).

Defendants were also convinced that the means of licensing employed by ASCAP and its combined members was an abuse of the copyright privilege, unjust, unreasonable and unfair; and that if copyright owners were required to compete among themselves, competitive forces and the market's impersonable judgment would establish a better system of music allocation (Tr. 173, 170-211, 265-266, 268-269, 284, 303-305, 306-307, 317, 318).

### *ASCAP's Antitrust History*

Over twenty years ago, on February 26, 1941, the United States brought an action against ASCAP charging ASCAP and its members with violations of the Sherman Antitrust Act, resulting on March 4, 1941, in a final decree on consent of the parties (Def. Ex. A-1) (*United States v. ASCAP*, Civil Action No. 13-95 (S.D.N.Y.).

The 1941 decree was superseded on March 14, 1950, by the amended final judgment commonly known as the 1950 Consent Decree (Def. Ex. A-2). This amendment resulted from two significant federal court decisions holding that the 1941 decree did not adequately cure ASCAP's unlawful licensing practices.[2]

Shortly after the *Alden-Rochelle* case was decided, Chief

2.

"On July 18, 1948, Federal District Judge Leibell handed down his memorable opinion in the *Alden-Rochelle* case declaring ASCAP to be involved in an illegal monopoly and illegal restraint of trade under Sections 1 and 2 of the Sherman Act . . . ASCAP, said the court, had the power to raise prices and exclude competitors when it desired to do so." (Timberg 299)

With respect to the Section 1 charge, the court stated in part:

"The combination of the members of ASCAP in transferring all their non-dramatic performing rights to ASCAP is a combination in restraint of interstate trade and commerce, which is prohibited by Sec. 1 of the anti-trust laws. It restrains competition among the members of ASCAP in marketing the performing rights to their copyrighted works." *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. at 894 (S.D.N.Y., 1948).

Judge Nordbye of the Federal District Court in Minnesota, in *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (1948), endorsed Judge Leibell's conclusion that ASCAP was still a price-fixing combination (Timberg, 300).

The amended final judgment of March 14, 1950, introduced a number of changes pertinent to the issues raised on this appeal (Def. Ex. A-2):

1. Although the 1941 decree limited ASCAP to taking only non-exclusive licenses from its members this limitation was reinforced by Section IV(B) which enjoined ASCAP from "limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of a public performance."

2. Sections V(A) and (B) revised the provisions of the 1941 decree concerning the issuance of licenses to networks and to manufacturers, to make it clear that they applied to the television industry as well as the radio industry.

3. A new provision, Section V(c), also required ASCAP to issue to motion picture producers a single license covering motion picture performance rights throughout the United States. This kind of licensing along with that required in V(A) and (B) is called in the trade "licensing at the source" or "clearance at the source."

4. A new provision, Section VI, directed ASCAP "to grant to any user making written application therefor a non-exclusive license to perform all the compositions in the ASCAP repertory."

5. A new provision, Section IX, directed that ASCAP shall "upon written application for a license for the right of public performance of any, some or all of the composi-

tions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested," and that if the parties are unable to agree upon a reasonable fee within 60 days, the applicant may apply to the district court in New York for the determination of a reasonable fee.

6. Other sections of the amended final judgment enjoined ASCAP from attempting to issue or enforce any performance licenses against motion picture theatre exhibitors and revised certain provisions of the 1941 decree concerning ASCAP's internal affairs and the distribution of fees collected by ASCAP. Some of these latter provisions were further amended on January 7, 1960 (Def. Ex. A-3).

At the present time, because of continuing dissatisfaction among ASCAP's own members, John C. McGeehan by order of the court having jurisdiction of the consent decree is examining the design and conduct of ASCAP's method of surveying performances. Whether this will result in additional amendments to the decree remains to be seen.

### *ASCAP and State Legislation*

In the 1930s, prior to the 1941 consent decree, frustrations of music users and their helplessness when confronted with ASCAP's monopoly power, motivated several state legislatures to take action. The Washington Protection of Copyrights Act, RCW 19.24 was passed in 1937. Several other states passed laws in attempts to protect their citizens.[3]

3. Such statutes were enacted in Vermont (Vermont Rev. Stat. c.54, Sec. 1175 (1947)); Nebraska (Neb. Rev. Stat. Sec. 59-1402 (1943)); North Dakota (N.D. Rev. Code, Sec. 47-2105 (1943)); Kansas (Gen. Stat. Kan. Sec. 57-205 (1940)); Florida (Laws of Fla. Ch. 19653 (1939)); Wisconsin (Wis. State Sec. 17701 (1937)); amend Laws Wis. (1937, c. 247, Laws Wis. and 177 (1941)); Montana Laws of Mont. (1937, c. 90)). See Warner, Radio & Television Rights 275 (1953).

ASCAP lost no time in challenging the legislation. But the United States Supreme Court readily disapproved of ASCAP's charge of federal supremacy and unconstitutionality. In the famous *Buck* case the court upheld a state's power to outlaw activities of price fixing combinations composed of copyright owners. Like the Washington act, both the Florida and Nebraska statutes made it unlawful for copyright owners to combine and operate within the state for the purpose of determining and fixing license fees.[4]

ASCAP also tried to test the constitutionality of the Washington law but the trial court dismissed ASCAP's challenge for lack of jurisdiction. *Buck v. Case,* 24 F. Supp. 541 (1938). On appeal the United States Supreme Court reversed. *Buck v. Gallagher,* 307 U.S. 95, 59 S.Ct. 740, 83 L.ed. 1128 (1939). Again ASCAP sued in the district court alleging unconstitutionality. The question was never answered. The district court held ASCAP could not invoke the aid of equity because its operations were in violation of the Sherman Act and its hands were unclean. *Buck v. Gallagher,* 36 F. Supp. 405 (D. Wash. 1940).[5]

4. The court stated:

"And, unless constitutionally valid federal legislation has granted to individual copyright owners the right to combine the state's power validly to prohibit the proscribed combinations cannot be held non-existent merely because such individuals can preserve their property rights better in combination than they can as individuals. We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws . . . We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long recognized power to regulate combinations in restraint of trade." *Watson v. Buck,* 313 U.S. 387, 403-404 (1941); *Marsh v. Buck,* 313 U.S. 406 (1941).

5. The district court said:

"Plaintiffs contend that the Washington statute is unconstitutional for a number of reasons . . . Before passing on that question, it is

Since *Buck v. Gallagher*, ASCAP has not challenged the Washington law. However, in 1948, ASCAP brought a suit for declaratory judgment to establish it had complied with the law. The Washington Supreme Court found to the contrary. It found ASCAP was claiming copyrights and the right to license songs on which the copyrights had expired and were part of the public domain. *Taylor v. State*, 29 Wn.2d 638 (1948).

The last court decision to be rendered on the Washington statute was by the Yakima County Superior Court in an order entered on July, 1962. This case is one involving a broadcaster licensed to ASCAP. It is still pending, and no doubt what is decided by this court will have bearing upon some of the questions pertaining to Washington statute. (In the Superior Court of the State of Washington, *Cascade Broadcasting Co. v. ASCAP*, No. 45887).

**Radio Station Music Requirements**

Music is a critical necessity to the broadcaster. Without it he cannot operate (Tr. 5, 6; R. 30, Fact 45, p. 9). A

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necessary to determine whether or not plaintiffs may invoke the aid of a court of equity. If a party has been engaged in an illegal business and been cheated, equity will not help him.' *Wheeler v. Sage*, 68 U.S. 518, 1 Wall. 518, 529. In other words, before plaintiffs may invoke the aid of a court of equity, they must come into court with clean hands. *Keystone Co. v. Excavator Co.*, 290 U.S. 240, 244, 54 S.Ct. 146, 78 L.Ed. 293. If the society exists in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. Secs. 1-7, 15 note, it, and the members composing it, are not entitled to a decree for its benefit.

* * *

"There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. Likewise, it has restricted substantially all competition in the sale of such right, because it has all such rights. Since the interstate commerce feature is conceded to be present, the Society clearly violates the act in question . . ." *Id.* at 406, 407.

radio station must have access to copyrighted music as a great portion of its time is devoted to broadcasting music (Tr. 5, 6; R. 30, Facts 45, 47, p. 9).[6]

Because of the importance of music to broadcasters, appellant (and the other defendants who settled) use extreme care in the selection of what music is to be broadcast. Mr. Walter Nelskog, vice president and general manager of appellant's radio station KIXI, reviews every record before it is played in order to be sure the station has and maintains a certain sound or image (Tr. 9).

Modern radio stations need and desire only certain types of music to fit their special kind of programming (Tr. 8). Examples are some play only western music, others religious, others classical (R. 30, Fact 81, p. 14). KIXI does not play rock and roll, western, hillbilly or other types of music (Tr. 9). It broadcasts only standards using special orchestral arrangements (Tr. 10, 11). In fact, all modern radio stations specialize in certain kinds of music played. They have need only for limited catalogues of music, and cannot possibly use the entire ASCAP repertory of over 1,000,000 compositions (Tr. 8, 9, 18, 173, 200, 201). Several of the defense witnesses testified to these facts.

ASCAP does not offer licenses of specialty catalogues to radio stations. Instead ASCAP licenses its entire repertory of popular, western, religious, classical, standards, etc., in one package and radio stations are, therefore, required

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6. Radio stations must compete for the public's attention. They must have an audience in order to sell their time to sponsors (Tr. 6, 7). Broadcasters compete with night clubs, television stations, theatres, restaurants and other industries in the entertainment field for their share of the public's time and attention (Tr. 6). Thus, broadcasters are in competition with many other users of music, including other stations.

to take all of ASCAP's 1,000,000-plus compositions or none (R. 30, Fact 82, p. 14).

The appellant (and the defendants who settled) cannot operate its station and stay in business without using ASCAP music (Tr. 105, 205, 246, 273, 314). Thus, an ASCAP license is vital since more than 50% of all performances of copyrighted music by broadcasting stations in the United States are licensed by ASCAP and are performances of compositions in the ASCAP repertory (R. 30, Fact 48, p. 9).

Not all of the revenues received by radio stations are derived from programs containing music. Stations have many programs such as news, sports, discussion, etc., which contain no music at all (Tr. 17, 140, 224, 226-227, 305). Nevertheless, the only licenses offered by ASCAP require that the station pay over 2% of all its gross revenues to ASCAP, even on programs using no music, or that the station pay 8% of gross revenues on only those programs containing music.[7]

Almost all music played on radio stations today is from records (Tr. 274). These are obtained from recording companies who, along with copyright owners, are most anxious to have stations broadcast their records in order to stimulate record sales (Tr. 24, 168). However, there is no way for a broadcaster to obtain a performance right from a recording company or anyone else when he buys a record (R. 30, Facts 80, 87, 67, 68, 69). The record itself carries no right to play it on a radio station (R. 30, Facts 58, 63, 64). Neither ASCAP or the appellees has ever offered record companies licenses authorizing broadcasting

7. As previously established, out of over 5,000 stations licensed today, less than 100 chose the license charging 8%. (R. 30, Facts 57, 62, p. 11.)

stations to perform the music contained on the record, i.e. cleared the record for performance at the source (R. 30, Facts 63, 64, 65, 66, pp. 11, 12).

Agreements between recording companies and composers (including the appellees by stipulation) provide that the right to record the music does not include the right to play it, and accordingly the performance right is left for only ASCAP to license (Def. Ex. 41, 42, 12).[8]

## SPECIFICATION OF ERRORS

### Preface

Because on several occasions prior to the trial the trial court asked the parties to stipulate to as many facts as possible, a very detailed and lengthy pretrial order was written (R. 30). The court also asked that all contentions of fact and law be specifically set forth. Accordingly the contentions were detailed and lengthy (R. 30, Pretrial Order and Exhibits).

Following the same procedure after the trial the appellees submitted and the trial court entered detailed Findings of Fact and Conclusions of Law (R. 37). It, therefore, seems to the writer that his duty to the court and to his client requires that he set forth his specifications of error consistent with and in the same detailed form as the trial court required in the Pretrial Order and the Findings of Fact and Conclusions of Law. This requires a large number of individual specifications because each fact and conclusion of law must be asserted and numbered separately.

8. This is so in face of the fact that composers and publishers, including these appellees, as well as recording companies, actively compete to have their music recorded and played on radio stations. (R. 30, Fact 59, p. 11; Def. Ex. A-2.)

Fortunately, most of the specifications of error fall into fairly broad classes. These are that the trial court erred in finding certain facts and conclusions of law, and that it erred in not finding others. Accordingly, for the sake of simplification and orderly classification, the writer has set forth in that portion of the brief immediately following each separate specification of error where the appellant disputes a finding of fact or conclusion of law set forth either in the Findings of Fact and Conclusions of Law (R. 37) and in the trial court's Memorandum Opinion (R. 37). However, each detailed fact or conclusion of law not found by the trial court but stipulated to by the parties or contended by the appellant in the Pretrial Order has been attached to the brief in Appendices "A-E." Each is numbered individually for ease of reference.

**Facts**

The court erred in finding that:

1. Defendants failed to prove plaintiffs or ASCAP violated Washington law relating to pooling of their interests without providing for per piece licensing (R. 35, Mem. Opin. p. 5).

2. There was no evidence of any abusive practice by either plaintiffs or their licensing agent which would deny them copyright protection (R. 35, Mem. Opin. p. 5).

3. The defendants failed to take licenses not because they feared state prosecution and did not want to violate state law, but that they failed to take licenses only to avoid paying license fees (R. 35, Mem. Opin. p. 5).

4. The licensing and policing of performances for profit can only be done by licensing organizations such as ASCAP, BMI and SESAC (R. 35, Mem. Opin. pp. 5-6).

5. The violations of plaintiffs of Washington law and the federal copyright and antitrust laws were minimal and the violations of the defendants unconscionable (R. 35, Mem. Opin. p. 6).

6. For at least ten years, each defendant regularly broadcast the musical compositions of plaintiffs and of other authors, composers and publishers for profit, without the payment of royalty or compensation to any person (R. 37, Fact 8, p. 4).

7. The performances were made without regard to the rights of plaintiffs and other proprietors of the federal copyright law (R. 37, Fact 9, p. 4).

8. In radio broadcasting, split-second timing is necessary to selection of musical compositions for broadcast (R. 37, Fact 24, p. 7).

9. The licensing of public performances for profit of copyrighted musical compositions by licensing organizations such as ASCAP is the only practical way by which copyright proprietors may exercise their right to license performances of their copyrighted compositions, and that it would be impossible for a single proprietor to police the use of his copyrighted songs (R. 37, Fact 25, p. 7).

10. ASCAP has no power to fix license fees, since any user has the absolute right to have the court determine a reasonable license fee (R. 37, Fact 26, pp. 7-8).

11. Plaintiffs have at all times in the last ten years been ready to negotiate with any broadcaster in the state of Washington for a license (R. 37, Fact 50, p. 15).

12. In the last ten years, ASCAP has not received any request from any broadcaster in the State of Washington

and any ASCAP member in interest for the issuance of a license to perform one or more specific compositions (R. 37, Fact 51, p. 15).

13. Neither defendant nor any officers of any defendant corporation has ever been threatened with prosecution under Chapter 19.24, RCW. There is no evidence that any broadcaster in the State of Washington has ever been threatened, although the majority of Washington broadcasters have taken licenses from ASCAP, have paid royalties and have publicly participated in judicial proceedings to obtain such licenses (R. 37, Fact 55, p. 18).

14. Defendant's failure to take licenses from ASCAP was not because they feared prosecution under Chapter 19.24 RCW. Defendants failed to take licenses only because they wanted to avoid paying license fees on the same basis charged to—and paid by—other broadcasting companies (R. 37, Fact 66, p. 18).

15. No Washington public official has made any complaint that ASCAP's per program license does not assess rates on a per piece system of usage (R. 37, Fact 52, p. 16).

16. There is no evidence that plaintiffs or other members of ASCAP have entered into a conspiracy to prevent recording companies from obtaining licenses authorizing broadcasting stations to perform publicly for profit any musical composition (R. 37, Fact 75, p. 19).

17. Each member of ASCAP may assign or license performing rights to recording companies (R. 37, Fact 69, p. 18).

18. The court erred in not finding all the facts which were stipulated to by the parties to be agreed facts and

made a part of the formal Pretrial Order (R. 30, Facts Nos. 9, 13, 19-22, 24-27, 29, 43-54, 56-57, 59-63, 67-70, 73-74, 79-87). As stated above in the preface, each of the facts stipulated to by the parties, but omitted from the trial court's findings, are set forth verbatim in Appendix "A."

19. The court erred in not finding the admitted facts taken from Plaintiffs' Answers to Defendants' Request for Admissions, which were agreed by the parties to be stipulated facts and made a part of the formal Pretrial Order (R. 30, Admissions Nos. 1-2, 26, 29, 32, 34, 36). As stated above in the Preface, each of the Admissions stipulated to be facts, but omitted from the trial court's findings, are set forth verbatim in Appendix "B."

20. The court erred in not finding as facts those which were set forth in the Pretrial Order as "Defendants' Contentions of Fact" (R. 30, Contentions Nos. 1-9, 12, 14-26, 28-32, 34-41, 50-53, 59-69). As stated in the Preface, each of these contentions is set forth verbatim in Appendix "C."

21. The court erred in not finding that the defendants relied on and were guided by statements of the attorney general and his assistants that the licenses offered by ASCAP violated Washington State Law, Chapter 19.24, and in particular the statements contained in his letter dated June 8, 1962, Def. Ex. No. A-14.

The court erred in making the following conclusions of law:

22. During the last ten years, defendants have committed numerous other infringements of plaintiffs' copyrighted musical compositions and of the copyrighted musical compositions of other authors, composers and publishers (R. 37, Concl. 3, p. 2).

23. Defendants' defenses based upon Ch. 19.24, RCW, are without merit and cannot be used to defeat plaintiffs' claims for copyright infringement (R. 37, Concl. 5, p. 21).

24. In consequence of ASCAP's filings with the Secretary of State of the State of Washington in each of the last three years, ASCAP and its members have fully complied with the provisions of 19.24.040, 19.24.050 and 19.24.055, RCW (R. 37, Concl. 6, pp. 21-22).

25. By bringing lawsuits against infringing broadcasters in the State of Washington, neither plaintiffs nor other ASCAP members have violated 19.24.050, RCW. No abuse of federal or state process results from plaintiffs bringing the present actions to compel infringing broadcasters to honor plaintiffs' rights under the Copyright Law nor from writing letters demanding that their rights be respected (R. 37, Concl. 7, p. 22).

26. Plaintiffs and other ASCAP members have not pooled their separate copyrighted interest in ASCAP for the purpose of fixing prices in violation of 19.34.020, RCW (R. 37, Concl. 9, p. 22).

27. The ASCAP "per program" license may reasonably be regarded as assessing rates "on a per piece system of usage" as the Washington statute uses that phrase. The willingness of ASCAP's individual members to negotiate for licenses containing rates assessed on a per piece system of usage also constitutes compliance with the statute (R. 37, Concl. 11, p. 23).

28. ASCAP and its members fully comply with the requirements of 19.24.020, RCW (R. 37, Concl. 12, p. 23).

29. Defendants' contentions as to the requirements of

Ch. 19.24, RCW, would deprive plaintiffs and all other copyright owners of their federally granted property rights (R. 37, Concl. 13, p. 23).

30. To construe the provisions of Ch. 19.24, RCW, so as to make the acts of the plaintiffs or ASCAP in these cases unlawful, would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment to the Constitution of the United States (R. 37, Concl. 14, p. 23).

31. Defendant's defenses and counterclaim based on the federal anti-trust laws are without merit (R. 37, Concl. 15, p. 23).

32. Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal anti-trust laws in any respect alleged by defendants or otherwise (R. 37, Concl. 16, p. 23).

33. In view of the rights granted to defendants by Section IX of the Amended Final Judgment, defendants cannot complain that they have been damaged or prejudiced by ASCAP's conduct (R. 37, Concl. 15, p. 23).

34. Neither plaintiffs nor other members of ASCAP have entered into a conspiracy to prevent recording companies from obtaining licenses authorizing any broadcasting station to perform publicly for profit any musical composition (R. 37, Concl. 18, pp. 23-24).

35. Even if plaintiffs' conduct in any respect could be considered a violation of either Washington law or the federal anti-trust laws, such violations are so minimal and the violations of the defendants so unconscionable that

plaintiffs should not be deprived of the right to maintain these actions for the deprivation of their property (R. 37, Concl. 19, p. 24).

36. The plaintiffs are entitled to damages of $250.00 for each infringement, or a total of $1,000.00 (R. 37, Concl. 20, p. 24).

37. The plaintiffs are entitled to reasonable attorneys' fees and costs of $300.31 (R. 37, Concl. 21, p. 24; R. 11, Judgment ....).

The court erred in not making the following conclusions:

38. The conduct and acts of each of the plaintiffs, of ASCAP, and of the other members of ASCAP, were and now are in violation of the Washington Constitution and of Sections 3 and 7, Chapter 218 of the 1937 Session Laws of the State of Washington, RCW 19.24.020, RCW 19.24.060.

39. Neither ASCAP nor the plaintiffs have ever properly filed the list or other information as required by Washington laws.

40. By reason of each of the plaintiff's violations of the constitution and laws of the State of Washington, each of the plaintiffs has unclean hands and none has any legal or equitable standing to maintain this action.

41. By reason of each of the plaintiffs' acts and conduct set forth herein, each of the plaintiffs has unclean hands irrespective of whether such acts and conduct amount to statutory violation, and none has any legal or equitable standing to maintain this action.

42. Each of the plaintiffs, ASCAP and its other mem-

bers has conspired and combined to restrain trade and commerce among the several states of the United States in violation of the Sherman Act, (15 U.S.C. §§ 1, 2). The specific violations expressed in defendants' contentions of law (R. 30, No. 7 a-j are set forth verbatim in Appendix "D".

43. Each of the plaintiffs, ASCAP and its officers, directors, agents, representatives, members and all others acting on behalf of ASCAP and plaintiffs should be enjoined from continuing their unlawful activities in violation of the Sherman Act, 15 U.S.C. §§ 1, 2. The specific injunctive measures sought in defendants' contention of law in the Pretrial Order (R. 30, No. 8 a-i are set forth verbatim in Appendix "E".

44. By reason of each of the plaintiffs' violations of the anti-trust laws of the United States, each of the plaintiffs has unclean hands and none has any legal or equitable standing to maintain this action.

45. By reason of each of the plaintiff's acts and conduct, each of the plaintiffs has unclean hands irrespective of whether or not such acts and conduct amount to a statutory violation.

46. Defendants have no control or voice in the legal proceedings between the United States and ASCAP and its members, and have no control or influence over the consent decree. Said consent decree cannot deprive defendants of the protection afforded them by Washington laws or by federal anti-trust laws, nor deprive defendants of their rights thereunder.

47. As here sought to be applied by plaintiffs, the

Amended Final Judgment of March 14, 1950, would deprive the defendants of their property without due process of law.

48. The defendant is entitled to a new trial to introduce newly discovered evidence, namely, the letters from advertising agency refusing to allow radio stations, including one of the defendants, to have an advertising order unless the stations had an ASCAP license.

49. The defendant is entitled to a new trial on the grounds of newly discovered evidence and material, discovered since the trial, and which could not have been obtained before the trial by the exercise of reasonable diligence.

50. Plaintiffs' actions for damages and injunction herein are barred by laches.

51. Defendants are entitled to damages, attorneys' fees and costs.

## ARGUMENT

### Summary of Argument

The appellees are misusing their copyrights and abusing the copyright privileges granted to them by Congress. In doing so they are unlawfully extending their copyrights, violating public policy of Washington State and Congress, and violating specific laws of Washington State and the federal antitrust laws. Such misuse of their copyright privileges bars the appellees, as copyright owners, from obtaining relief for copyright infringement from the appellant.

Furthermore, appellees' violations of the federal antitrust laws have damaged and otherwise injured the appellant and other users of music. Such damage and injury afford the appellant a right of action against the appellees under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 16) for damages, attorneys' fees, costs and, most important, injunctions to correct the abuses.

## The Statutes Involved

The texts of all statutes involved are set out verbatim in Appendix "F."

## Introduction

This case is of extreme importance to two industries—the music industry and the broadcasting industry. The problems have been festering for over three decades. What will be decided runs deeper than whether the Washington State statute is a defense or whether appellees have violated the Sherman Act. The substance of what will be decided is whether the copyright laws actually work primarily for the benefit of composers or primarily for the benefit of the public, and whether public policy that competition must remain free is for the music industry in fact real or illusory.

This case is a plea for free competition. The appellant is seeking the right to bargain for and buy music in a competitive and free market unfettered by artificial restraints (Tr. 26, 269, 304, 315, 317-318). (Please see Appendix "G" for text of testimony.) Appellee is powerless alone. Appellant must have and therefore seeks the aid of this court.

## Music and the Public Interest

### *The Public Policy Behind the Copyright Law*

The United States Constitution, Article I, Section 8 provides:

> "Congress shall have power . . . to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writing and discoveries." U.S. Constitution, Art. I, Sec. 8.

On February 22, 1909, the Committee on Patents of the House of Representatives reported on the bill enacting the Copyright Act of 1909 which is the source from which all rights of appellees flow. The committee report declared the official policy behind the creation of copyrights and stated as follows:

> "The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.
>
> * * *
>
> ". . . it has been a serious and difficult task to combine the protection of the composer with the protection of the public and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests." House Comm. Rep. on Bill enacting Copyright Act of 1909, to amend and Consolidate the Acts Respect-

ing Copyright, H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909).

The above committee report makes it clear that the copyright laws are for the benefit of the public, not the composer, and that Congress, even in 1909, feared monopolistic abuses by copyright owners. This policy should be kept constantly in mind when determining the issues of this appeal:

> "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lies in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artists serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158, 68 S.Ct. 915, 92 L.Ed. 1260 (1948). Quoted with approval in *United States v. Loew's, Inc.*, 371 U.S. 38, 9 L.Ed.2d 11 (1962).

The appellees and ASCAP have turned the purpose of the copyright law around. The law is now being abused and employed primarily for the benefit of a few to exploit the many. Unless this court recognizes the evil and puts a stop to it, our courts will become a party to one of the slickest schemes devised to exploit a privilege beneficently bestowed.

The broadcast of music by radio stations is the general public's most immediate source of music and it is the principal medium through which music is transmitted. Any system which hinders the free broadcast of music and restricts its availability to radio stations harms the public interest. Such repressions not only deprive the public of affluent availability, but the purpose of the copyright act to engender and stimulate the flow of music to the public is stymied.

### *The Public Policy Behind the State Law*

In the State of Washington the public's interest has become the concern of the legislature, and it has been expressed in statute form.[9]

### *The Public Policy Behind the Anti-Trust Laws*

The great public concern which is at stake here is the policy laid down by Congress that competition shall be and remain free. In the music licensing industry this policy has been made a joke by bright lawyers with ingenious schemes. The appellees and ASCAP have taken the privileges bestowed to them by the copyright law together with the benign parol of the consent decree and twisted them into a lucrative means of exploitation.

Basic to this appeal is an understanding of the clear and sound policy expressed time after time by the Supreme Court of the United States:

> "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the nation's resources and thus direct the course its economic development will take." *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 605 (1953).

9. Session Laws of Washington, 1937, c. 218 § 6, RCW 19.24.060. See Appendix "F."

Section 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 26 Stat. 209 (1890) as amended, 15 U.S.C. Sec. 1 (1958).

Section 2 of the Sherman Act declares:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor." 26 Stat. 209 (1890), 15 U.S.C. Sec. 2 (1958).

## Summary of the Criteria for Decision

To reemphasize, the basic public principles declared in the copyright act and the anti-trust laws are:

First. The purpose of the copyright laws is primarily to benefit the public, not primarily to benefit the copyright owner.

Second. The purpose of the anti-trust laws is to preserve free competition.

A complete understanding and acceptance of these two fundamentals is required to properly decide the issues in this case.

## General Rules Applicable to Trial Court's Findings and Conclusions

This case was presented primarily on the agreed facts in the Pretrial Order (R. 30) and the depositions. The oral testimony at the trial was rather brief, and, in fact, the appellees called only one witness. The trial court made rather extensive findings of fact, which makes this brief difficult to organize because of the interplay of the facts. Therefore the legal arguments made herein concerning the Findings of Fact and Conclusions of Law (R. 37) are meant to apply throughout this brief without unnecessary repetition.

Where the evidence presented is primarily in written form, such as documentary evidence and depositions, the appellate court is in as good a position to evaluate the facts as the trial court, and the trial court's findings of fact will not be given their usual weight.

> "In *Carter Oil Co. v. McQuigg* [CCA 7th, (1940) 112 F.2d 275] the court declared that a district court's findings of fact, where the testimony consists of documentary evidence and depositions, is 'subject to free review unaffected by presumptions which ordinarily accompany . . . findings on controverted issues.' A number of courts likewise have held that findings . . . on stipulated facts, on testimony taken by depositions, and in similar situations where credibility is not seriously involved or, if it is, where the reviewing court is in just as good a position as the trial court to judge credibility, are not binding on the appellate court and will be given slight weight on appeal." 5 MOORE'S FEDERAL PRACTICE 2637.

This is particularly true in this case where the trial judge, excusing his failure to write a substantive opinion, stated in his memorandum opinion:

> "I also concluded that such an opinion would be of limited value because there are practically no controverted issues of fact . . ." (R. 35, Mem. Op., p. 4)

As to the trial court's conclusions of law, the appellate court is not bound whatsoever:

> "This is clear both from the context of the rule and from long established principles both at law and in equity that the appellate court is, of course, not concluded by the trial court's view of the law. The requirement in Rule 52(a) that, in addition to finding the facts, the district court shall 'state separately its conclusions of law thereon' is to furnish the causal link between the facts and the judgment rendered. But in reviewing the judgment, so far as questions or conclusions of law are concerned, the appellate court is not concluded in any degree by the trial court's view of the law." 5 MOORE'S FEDERAL PRACTICE 2630-2631.

Because neither the Findings of Fact nor the Conclusions of Law are to be given much weight in this somewhat unique record, this brief will not belabor at length the particularities of the trial court's Findings or Conclusions.

**The Trial Court's Failure to Find Facts Previously Stipulated by the Parties**

(Specification of Errors 18 and 19)

After extensive efforts, many conferences, many arguments, extensive discovery, and, at the insistence of the trial court, the parties hammered out a lengthy and detailed pretrial order (R. 30).

The parties stipulated to a great number of facts in order to obviate the necessity of other proof at the trial. Yet, the trial court in its Memorandum Opinion (R. 35) and the Findings of Fact and Conclusions of Law (R. 37) arbitrarily selected only those facts most favorable to appellees and ignored finding those favorable to appellant. Thereafter, when challenged by the defendant on motions to amend and make additional Findings of Fact and Conclusions of Law (R. 44, 45), the trial court summarily dismissed defendant's motion by the sweeping statement that the stipulated facts omitted were repetitious or irrelevant. (R. 48, p. 5).

This generalized and oversimplified conclusion is an error on the part of the trial court:

> "The pre-trial order, when entered, 'controls the subsequent course of the action, unless modified.' No proof need be offered as to matters stipulated to in the order, since the facts admitted at the pre-trial conference and contained in the pre-trial order stand as fully determined as if adjudicated at the trial. This is true, even as to jurisdictional facts." 3 MOORE'S FEDERAL PRACTICE 1126-1127.

Of the many stipulated facts ignored by the court in its findings, appellant, for the sake of brevity, will show here the relevancy of only a few as examples. Rather than argue the relevancy of each of the facts here, appellant suggests the relevancy of all of the omitted stipulated facts will become apparent as they appear and are relied upon in the brief. Appellant respectfully asks the court to recognize the facts as they are referred to by numbers throughout this brief.

Some of the most obviously relative stipulated facts omitted are:

1. "The ASCAP repertory includes more than a million musical compositions." (R. 30, Fact 13, p. 3; Appendix "A," No. 18-1.)

This fact is relevant to show the vast size of the ASCAP copyright pool on the issues of power to control prices, power to require licenses, necessity to broadcasters, consideration of copyrights, monopoly, control of market—all possible violations of the Sherman Act

(Secs. 1, 2). It is sufficient to cite the most recent case where the extent of the pool was relevant. See *Hazeltine Research, Inc., v. Zenith Radio Corporation,* 239 F. Supp. 51 (1965).

2. "The affairs of ASCAP are managed by its Board of Directors, the members of which are elected by the members of ASCAP. The fee to be quoted for any license of the ASCAP repertory is initially determined by the Board of Directors, as distinguished from its members." (R. 30, Fact 24, p. 6; Appendix "A," No. 18-7.)

That the license fee is determined by group action goes to the issue of price fixing and the per se rule. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), and other cases cited *infra.*

3. "In the last ten years, neither ASCAP nor any plaintiffs have entered into any license agreement with any broadcasters located in the State of Washington on any other basis than the forms [Per Program and Blanket License] and similar forms." (R. 30, Fact 26, p. 6; Appendix "A," No. 18-9.)

Again this fact goes to the issue of price fixing and is evidence of conspiracy to peg prices within a stabilized range. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States v. Masonite Corporation,* 316 U.S. 265 (1942).

4. "Music is a necessity to the broadcasting industry in the State of Washington and throughout the United States." (R. 30, Fact 45, p. 9; Appendix "A," No. 18-14.)

This is relevant to the issue of competition and control, to the issue of the public interest affected, to tying agreements, block booking and much more too obvious to mention. *Alden-Rochelle, Inc., v. ASCAP*, 80 F.Supp. 888 (1948); *M. Witmark & Sons v. Jensen*, 80 F.Supp. 843 (D. Minn. 1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), and other cases cited later in this brief.

5. "Each musical copyright is unique." (R. 30, Fact 61, p. 11; Appendix "A," No. 18-28.)

The uniqueness of the tying product is essential to the issue of tying agreements. *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), and other cases too numerous to repeat the citations here, but cited and relied upon later in this brief.

6. "ASCAP makes per program licenses available to all broadcasters; fewer than 60 to 100 broadcasters in the United States [out of the approximately 5,500 in existence] elect that form of agreement. At the time of the alleged infringement and now, none elect that form in Washington." (R. 30, Fact 62, p. 11; Fact 57, p. 11; Appendix "A," Nos. 18-29, 18-25).

This shows the unreasonableness of the alternative to the standard Blanket License form offered. See *Hazeltine Research Inc., v. Zenith Radio Corporation*, 239 F.Supp. 51 (1965), pages 69-78.

> "Although it may be said that the Hazeltine proposals on the surface were offers to treat of individual patents, the design was quite apparent—to force by unlawful coercion the acceptance of unwanted patents. This constituted an illegal extension of the patent monopolies." *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F.Supp. at 77.

7. "ASCAP does not offer licenses to broadcasters

such as western, religious, 'good music,' classical, 'top 40.'" (R. 30, Fact 82, p. 14; Appendix "A," 18-45.)

Again, this is relevant to abuse of the copyright privilege and misuse of power gained from pooling. Competition is stifled because only one form of license is offered—all or nothing. Comparing the *Zenith Radio* case, *supra,* the above is all the more relevant. There the patent owner at least offered specialty lines from the patent pool, but the court held this too was only an illusory offer to force Zenith ". . . to accede to Hazeltine's demand and accept a full package license." *Id.* at 71. The above fact shows ASCAP does not offer a real or reasonable choice of licenses. This is relevant to misuse of copyrights.

8. "The performance rights to some music in ASCAP's repertory is vastly more valuable than the performance rights to other music in ASCAP's repertory, and of all the millions of musical compositions copyrighted very few become hits or of any significant value. This is also true of the performance rights to music written by plaintiffs." (R. 30, Fact 83, p. 14; Appendix "A," 18-46.)

"The revenue distributed by ASCAP, pursuant to the consent decree, to its members from performance rights fees cannot be segregated to determine how much money is distributed for any particular composition." (R. 30, Fact 84, p. 14; Appendix "A," 18-47.)

Appellant fails to see how two facts could be more relevant to this case than the above. The courts agree. Simply reading the *Alden-Rochelle* and *Witmark* cases, *supra*, makes this obvious. To repeat the issue, the antitrust laws make it illegal to license or treat unique copyrights like fungible goods or so many bushels of wheat. When this was done in the *Zenith* case the court stated the rule which the present trial court ignored completely:

> "The reward sought by plaintiff from defendant for inventions to be licensed is in no way related to the quality of the individual patents and under the package license each patent drew strength from others, thus unlawfully extending the monopoly of each." *Hazeltine Research, Inc., v. Zenith Radio Corporation,* 239 F.Supp. at 77.

Again:

> "Moreover, the reward demanded by plaintiff for a license under less than the full package of patents is no way related to the quality of the patent . . ." *Id.* at 72.

With the above as examples, it should be immediately apparent that the trial court's indiscriminate generalization that all the agreed facts it failed to find were irrelevant is error. In fact, appellant fails to understand how the trial court could have come to such a conclusion except by caprice or failure to understand the issues.

This is especially true where the trial court disallowed any cumulation of the evidence:

> "The Court: Let me make an announcement now. I think I ought to call to the attention of both of you the fact that you need not develop from live witnesses evidence that is stipulated.
>
> "If something was stipulated, it is not necessary to ask a witness about it, and, as to matters that have not been stipulated, if you ask a witness once and you get the right answer, you do not have to ask him that same question over again. You may proceed." (Tr. 199)

Then the trial court did an about face by not finding as facts the stipulated facts and by not finding facts that were proved at the trial to which no controverting evidence was offered.

Even counsel for appellee agreed that the stipulated facts were uncontroverted:

> "Mr. Rifkind: Those things which we have stipulated to, of course we are bound by. We won't argue about that. We have negotiated out many stipulations." (Tr. 29)

**Appellees Have Violated Washington Law**

(Specification of Errors 2, 28, 38 and 39)

***Issuing Blanket Licenses***

(Specification of Errors 1, 21, 28 and 38)

In Washington it is unlawful:

> ". . . for two or more persons holding or claiming separate copyrighted works . . . to issue blanket licenses . . . for the right to commercially use or perform publicly their separate copyrighted works." RCW 19.24.020.

The language is clear. It required no construction. Blanket licenses are unlawful. There are no conditions—no qualifications to the statute. In fact, the language of the Washington law is so clear that appellant is dumbfounded at the trial court's decision that the appellees are not violating Washington law. One possible explanation is that the trial court confused later language in the section that allows copyright owners to pool their interests and fix prices on condition that they issue per piece licenses. But the statute does not say they may issue blanket licenses if they also issue per piece licenses.

Further, appellees do not deny they are "two or more persons, holding or claiming separate copyrighted works," or that they "issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works" (R. 30). In fact, appellees admit and have stipulated in the Pretrial Order that they issue blanket licenses (R. 30, Facts 19, 22, 62 and 69).

In addition to radio and television blanket licenses, ASCAP and appellees through ASCAP offer twenty other types of blanket licenses in Washington State (Def. Ex. 7, Def. Ex. 8, Def. Ex. 8-A, Plt. Ex. 6). Under the statute, to issue these licenses is to violate the law. This is true, regardless of whether or not appellees also offer per-piece licenses. The Washington State Attorney General has so stated.

> "You have asked, by your recent letter, whether the issuance of 'blanket' licenses and 'per program' licenses (a form of 'blanket' licenses) by an association of holders of copyrights for musical compositions violates Chap. 218, Laws of 1937 (RCW 19.24), and whether licensees signing such licenses are subject to the sanctions of the statute.
>
> "It appears from the plain wording of the statute that it is unlawful for such associations to issue such licenses." Letter dated June 8, 1962, from John J. O'Connell, Attorney General, State of Washington, to Senator Albert C. Thompson, Jr. (Def. Ex. A-13)

The fact that in 1959 Judge Ryan signed an order containing a pre-agreed statement that the licenses could be lawfully entered into is of little consequence (R. 6, Pl. Reply Ex. "D"). The order was submitted to the court for signature upon negotiated agreement of the parties (R. 30, Pretrial Order, Agreed Fact 74). The defendants were not parties to those negotiations or that order (R. 30, Pretrial Order, Agreed Fact 28). It was submitted to the court for signature without the benefit of testimony, affidavits, memoranda, briefs, or any argument by lawyers. It was limited to those parties, at that time, a mutual agreement to remedy that specific situation, under the conditions then facing the parties—no more, no less. It was a settlement of differences dictated by the parties thereto, and it cannot bind one not a party. *Sam Fox Publishing Co. v. United States*, 366 U.S. 604 (1961).

Faced with the overpowering ASCAP repertory and ASCAP's refusal to issue licenses, the broadcasters would have signed almost anything (R. 30, Fact 73).

***Pooling Copyrights, Fixing Prices and Collecting Fees***
(Specification of Errors 11, 15, 18-24, 27, 39)

In Washington it is also a crime for two or more persons holding or claiming separate copyrighted works,

(1) "to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works," or

(2) "to pool their separate interests" or

(3) "to conspire, federate, or join together for the purpose of collecting fees in this state,"

unless per piece licenses are issued (RCW 19.24.020). The statute states: "Such persons may join together if they issue licenses on rates assessed on a per piece system of usage" (RCW 19.24.020). See *Taylor v. State*, 29 Wn. 2d 638, 188 P.2d 671 (1948); *Buck v. Gallagher, supra*, at 99). Thus copyright owners may band together, may pool their interests and may conspire, federate and join together, provided they issue per piece licenses.

What is a "per piece" license, or, as the statute says, "a license based upon a per piece system of usage?" A per piece license is a license where rates are assessed "... on a basis of so much money per each time a piece of music is played or used in a public performance for profit" (RCW 19.24.140).

Plaintiffs' licenses entitled "Washington Local Station Per Program License" are not per piece licenses (Def. Ex. 7, 8, 8-A). The rate for these licenses is based upon adjusted gross income derived from all programs using ASCAP music. The rate is an unreasonable 8%[10] of the gross revenue from the program, whether one ASCAP song is played or ten seconds of one song or ten songs or twenty songs or any number of songs. This is a far cry from "so much money per each time a piece of music is played." By signing such a license the licensee gets a blanket right to use the entire repertory—a full package —and pays on gross revenue. This is not so much money each time a piece of music is played. (See the previous section "ASCAP Licenses," *supra.*)

It is preposterous for appellees to assert that the per program licenses are per piece licenses. In the first place, Mr. Herman Finkelstein, Chief Attorney for ASCAP, has stated on several occasions under oath that per program licenses offered by ASCAP are blanket licenses:

> "Both the program license and the blanket license are blanket licenses, that is the user has the right to use everything in the repertory without getting any special permission; by merely entering into the licensing agreement the broadcaster has a right to

10. Just how unreasonable is shown by the fact that of over 5,000 broadcasters in the United States fewer than 100 have the "Per Program" license. (R. 30, Agreed Fact 62, p. 11, Agreed Fact 57, p. 11.)

> use everything . . ." Statement of Herman Finkelstein, September 18, 1956, Hearings Before the Antitrust Subcommittee (Committee No. 5 of the Committee on Judiciary of the House of Representatives, 84th Cong., 2nd Sess., Part 2, Volume 2).
>
> "The radio station or network or the television station or network has its option to take a license on a blanket basis or what is called a per program basis that is still a blanket basis but the payment is in relation to those programs which use music in the ASCAP repertoire." Hearings Before the Subcommittee on the Select Committee of Small Businesses on the Policies of ASCAP, 85th Cong., 2nd Sess. 21 (1958). (R. 30, Def. Ex. 48.)

Mr. Timberg was not confused by the label "Per Program." He said:

> "ASCAP licenses only the pooled aggregate of the performing rights assigned to it by its member, i.e., its entire repertory. It licenses that aggregate for specific industrial uses—radio broadcast, dance hall or symphony concert—but its licenses always convey a blanket authorization to the licensee to use its entire repertory; it never licenses the right to perform individual pieces, or individual publisher's catalogues, or any part of its repertory." Timberg, 297.
>
> * * *
>
> "As a matter of linguistic purity, all ASCAP radio licenses are blanket licenses in that they entitle the station to use the entire ASCAP repertory." Timberg, 310.

The Attorney General of the State of Washington states that per program licenses are blanket licenses and that it is unlawful for ASCAP, or plaintiffs through ASCAP, to issue such licenses. (See letter, June 7, 1962, from Senator Albert C. Thompson, Jr., to John J. O'Connell, Attorney General, and letter, June 8, 1962, from John J. O'Connell, Attorney General, in reply (Def. Exs.

A-13, A-14). (See also Attorney General's Opinion, Nov. 3, 1941, Def. Ex. A-50.)

The trial court's finding that the appellees, as individual copyright owners, have always been ready to issue licenses on a per piece basis to broadcasters, and this satisfies the statute, is error (R. 37, Concl. 11, p. 23).

The statute requires that copyright owners file a complete list of the prices demanded for their works.

> ". . . a complete list of their copyrighted works together with a list of the prices charged and demanded for their various copyrighted works shall be filed . . ." RCW 19.24.040.
>
> "No person . . . shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state . . ." RCW 19.24.055.

ASCAP's members (including appellees herein) have never filed individually under the state law. They have never shown they offered "per piece" licenses to broadcasters by filing one with the Secretary of State. They cannot at the trial therefore assert they were willing to offer them if only asked. This is hindsight and a sham.

If the filings made by ASCAP with the Secretary of State (Def. Ex. 7, 8, 8-A) do not purport to list all rates offered, charged, or demanded by its members, or if they do not purport to be filed for the members, then ASCAP's members either (1) have not filed as required, or (2) have not made a complete filing as required. Both omissions are violations.

The fact is, of course, that appellees individually have no per piece agreements. In fact, as the depositions show, most of the appellees did not even know that the Washington law requires them or even what they are (Def. Ex. A-31(a), Deposition of Herman Starr, pp. 31-33; Def. Ex. A-31(c), Deposition of Carolyn Leigh, pp. 16-17; Def. Ex. A-31(c), Deposition of Irving Brown, p. 7).

It is also significant that whenever broadcasters wrote ASCAP asking for per piece licenses—which many broadcasters have done on numerous occasions—ASCAP did not even reply. (Def. Ex. A-15, A-16, A-17, A-18, A-19, A-20, A-21, A-22). (See Def. Ex. A-31d), Deposition of Louis E. Weber, pp. 12-14, 20.) The only conclusion defendants could assume by such silence is that none were available. For this reason it was stipulated that, if called as a witness, each defendant would testify that he did not ask for a per piece license from individual plaintiffs, because to do so would have been a useless and futile act (R. 30, Fact 27). Furthermore, several witnesses testified that defendants at all times have been ready to negotiate and pay fees on a per piece rate. But defendants could not negotiate for what was not available (Tr. 30, 31, 171, 202, 264, 265, 266, 268, 273, 284, 292, 301, 303, 313, 315).

Appellees also argued that if they or ASCAP offer at least *someone* a per piece contract, this satisfies the statute. This is a specious argument for the following reason. It was stipulated that the filings set forth the only forms of licenses which were and are made available by ASCAP in Washington, and that the filings do not contain any per piece licenses offered to broadcasting stations (R. 30, Facts 25, 28, 43 and 44). The single per piece license filed by ASCAP is in "Schedule 11, Schedule of License Fees for the Performance of Specific Compositions." The title of the license itself states broadcasters are expressly excluded:

> "Schedule of License Fees for the Public Performance for Profit of Specific Compositions in the Repertory of the American Society of Composers, Authors and Publishers in Establishments *Other than Radio and Television Broadcasting Stations*." (Def. Ex. 7, 8, 8-A, Schedule 11). (Emphasis added)

Appellees and ASCAP cannot circumvent the law by the neat device of offering one per piece license out of twenty-five and then barring the only users they in fact license from having it. This is violation of the spirit and letter of the law. It was clear error for the trial court to find "compliance" with the Washington law by this transparent device.

Appellant had the right to rely on the filings, and appellees should be estopped from now asserting that the filings did not reflect all the licenses that were available.[11]

It is clear that appellees, not having offered or issued per piece licenses to broadcasters in Washington, may not lawfully "join together" and the trial court's finding that the appellees stood ready to negotiate on a "per piece system of usage" is in error (R. 37, Fact 50, Concl.

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11. Appellees have misrepresented their offerings to defendants and the public. Omission, intentional or unintentional, is a misrepresentation to anyone who relied upon the filings to ascertain what licenses were available. Certainly, appellant had no knowledge or indication of any readiness on the part of appellees to negotiate or offer per piece licenses, or any licenses, for that matter. If ASCAP members seriously meant the per program license to be a per piece license, why did they not call it a "per piece" license? And when ASCAP "advised" broadcasters that they had better sign one of the two forms of blanket licenses, no mention was ever made of any other kinds of licenses being available—if in fact they were—which, for all practical purposes, they were not. (Def. Ex. A-24, A-43.)

6). Also, the court's conclusion that "per program" license may be regarded as a "per piece" license in compliance with the Washington Statute (R. 37, Concl. 11) is manifestly wrong.

**Collecting fees**

Appellees are violating the Washington statute in another respect. They are collecting fees in this state (R. 30, Facts 20, 23). As stated before, RCW 19.24.020 makes it unlawful for appellees to ". . . federate, or join together for the purpose of collecting fees in this state." ASCAP's Articles of Association state one of the purposes of ASCAP as follows:

> "Plaintiffs, together with the other members of ASCAP at all times pertinent hereto associated, as stated in the ASACP Articles of Association, for the following purposes, among others:
>
> "To grant licenses and collect royalties for the public representation of the works of its members." (R. 30, Fact 16)

The trial court found:

> "At all times pertinent, plaintiffs have received royalties . . ." (R. 37, Fact 54)

Further argument by appellant should not be necessary.

**Pooling copyrights**

It is incontrovertible that ASCAP's members are "pooling, federating and joining together." (R. 30, Facts 10, 18, plaintiff's membership in ASCAP; Facts 11-4, nature of ASCAP and its combined repertory of over one million, and R. 30, Facts 19, 20, 21, 23, 29, 69, issuing licenses and collecting fees.)

The trial court's findings of fact are that the appellees pool their rights (R. 37, Facts 15, 16, 17, 18, 19, 20, 21, 23). (See also Def. Ex. A-31g.)

Again, further argument should not be necessary.

**Price fixing**

(Specification of Errors 26)

The trial court's conclusion that appellees and other ASCAP members have not pooled their separate copyrighted interests for the purpose of fixing prices is in error (R. 37, Concl. 9).

The language of the statute does not require that prices be actually fixed, only that plaintiffs band together for the purpose of fixing them. It is incredible to urge that appellees, together with the other members of ASCAP, have not banded together for the purpose of fixing prices. Mr. Stanley Adams, ASCAP's President, testified ASCAP sets uniform prices (Def. Ex. A-31g, p. 59).

ASCAP is managed by a board of directors. ASCAP's Articles of Association, Art. IV and Art. V, pages 9, 15, state:

> "Powers of the Board of Directors:
>
> ". . . It is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:
>
> ". . . to fix the rate, time, and manner of payment of royalties for performances of all works registered with the Society . . ." (*Id.* at Sec. 2, p. 15) (Def. Ex. A-4)

It has been stipulated that the board initially sets the fees to be charged:

> "The fee to be quoted for any license of the ASCAP repertory is initially determined by the Board of Directors, as distinguished from its members." (R. 30, Fact 24)

This is also the uncontroverted testimony of ASCAP's President, Stanley Adams (Def. Ex. A-31g, p. 13).

The point is that the members have federated or joined together "for the purpose" of collecting fees, and this is a violation of the Washington Act. The power to establish a particular rate is immaterial to the violation.[12]

**Threats of Suits**

(Specification of Errors 13, 14, 25, 29)

The Washington law also makes it a crime for the persons to use combined power to extort fees from and exploit citizens of the State of Washington. It is unlawful to use a:

> ". . . systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits." RCW 19.24.060.

Federal courts also recognize that suits for infringement

12. The fact that appellees claim they stood ready to negotiate for a separate license and to deal individually is also immaterial to the charge of price fixing. This is a sham—a straw man. In *Taylor v. State, supra,* the court attached no significance to the fact that ASCAP had only the non-exclusive right to license its members' work and the members were free to deal individually.

> "It should be added that the members at the present time do not confer the exclusive power over their individual copyrighted compositions to ASCAP but may, under certain conditions, act for themselves individually." *Taylor v. State,* 29 Wn.2d 643.

See also the recent holding in *Hazeltine Research, Inc., v. Zenith Radio Corporation,* 239 F. Supp. 51 at 77.

> "Although it may be said that the Hazeltine proposals on the surface were offers to treat individual patents, the design was quite apparent—to force by unlawful coercion the acceptance of unwanted patents."

can be used as weapons to intimidate others and further existing monopolistic abuses. In a patent case where the plaintiff sued for infringement and the defendant counterclaimed for violation of the antitrust laws, the court in assessing treble damages for the defendant stated:

> "The trial court also found that the infringement action and incidental activities of Kobe were intended and designed to further the existing monopolistic purposes . . . The infringement action and related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, but when considered with the entire monopolistic scheme which preceded them. We think, as the trial court did, that they may be considered as having been done to give effect to the unlawful scheme . . . To hold that there was no liability for damages caused by this conduct, though lawful in itself, would permit a monopolizer to smother every potential competitor with litigation before it had an opportunity to be otherwise caught in its tentacles and leave the competitor without a remedy." *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 425 (10th Cir. 1952) *certiorari* denied 344 U.S. 837, 73 S.Ct. 46, 97 L.Ed. 651 (1952).

In *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F.Supp. 51 (1965), the facts were very similar to the case at bar. There the plaintiff controlled a pool of television patents and forced the defendant to take a package license with fees based on gross revenues. The plaintiff filed numerous infringement suits against those ". . . who refused to sign its license agreement" (*Id.* at 70). The court in holding for the defendant recognized the coercive effect of infringement threats and suits:

> "It [the defendant infringer] was forced either to cease manufacturing and selling the television receivers, pay tribute with consequent increase in costs or incur the expenses incident to the defense of pro-

> tracted patent litigation. Although defendant's choice determined the nature and amount of the resulting damages, it was the necessity of having to choose that occasioned the injury." (*Id.* at 72.)

In judging that there was no abuse of federal or state process from plaintiffs bringing the present suits (R. 37, Concl. 7), the district court chose to ignore the Washington statute and refused to follow basic concepts of equity applied in the federal system.

Ample evidence is in the record of threats, coercion and a systematic scheme. The following findings of fact by the trial court are proof of a scheme: ASCAP is paying all expenses of these actions and the others which were settled (R. 37, Fact 55); ASCAP selected and retained the law firms (R. 37, Facts 55 and 56); ASCAP arranged to have stations monitored for infringements (R. 37, Fact 57) and continues to do so (R. 37, Facts 58, 59); ASCAP has authority to commence these actions and other actions (R. 37, Facts 60, 61); and to arrange for settlement (R. 37, Fact 62).

It is hardly a coincidence that in 1962, almost three decades after passage of the Washington law, nearly 100 copyright owners—all members of ASCAP—sued for infringement within a period of a few months. Clearly these circumstances show a "campaign or scheme." They also show "extortionate means and terrorizing practices."

In the eighteen months prior to the trial appellees and other ASCAP members brought 15 suits against 11 radio stations, alleging 272 infringements (R. 37, Fact 63). The potential liability to the small radio stations was staggering. Statutory damages alone could amount to $1,360,000.[13]

13. Statutory damages can be assessed at $5,000 per performance, The Copyright Act, 17 U.S.C.A. § 101(b).

It must be remembered that ASCAP is a combination of not merely a few copyright holders, but of over 8,800. When ASCAP commenced these suits it presented to the defendants the awesome picture of a combine with resources of over $36,000,000 a year and over a million copyrights. The sheer size of this combine is intimidating to any broadcaster.

Another striking piece of evidence is the tactics used against Wescoast Broadcasting Co. This company was a defendant in the cases consolidated for trial. It operates a radio station in Wenatchee, Washington. Immediately after refusing to sign an ASCAP license and settle suits pending against it, the company was sued for an additional 28 infringements on which statutory damages would not be less than $7,000 but could be $140,000 plus costs and attorneys' fees (R. 30, Pretrial Order, Plaintiff's Answer to Admission 26). $140,000 is as much as the station's gross income for a full year, and several times its entire profit (Tr. 304).

More evidence in the record is in Defendant's Exhibit A-43. On July 15, 1963, ASCAP's lawyer wrote several form letters to Washington radio stations demanding:

> "We have recently settled a number of copyright infringements in the Federal courts against Washington radio stations.
>
> "We have prepared a complaint against your station for playing copyrighted music for profit without the consent of the owners. We are authorized to offer you the same settlement terms, provided you indicate your acceptance of these terms within ten days from the date of this letter." (Def. Ex. A-43).

The most impressive evidence of intimidation was ASCAP's arbitrary refusal to license all radio stations located in Washington in 1959 (R. 30, Fact 73). All broadcasters located in Washington were by a decision made in New York deprived of the use of over one million musical compositions combined in the largest music licensing repertory in the world!

Finally, one must ask why was one defendant, Rogan Jones, sued personally? By suing this individual, the appellees and ASCAP hoped to intimidate him by threat of loss of his personal assets into signing a license. They wanted to make him an example of what was in store for others who fought them. Whereas all other broadcasters were sued for only a few infringements, Mr. Jones was sued for scores of them. It takes no stroke of genius to realize that Mr. Jones had been singly selected for annihilation. If this is not evidence of a carefully plotted "systematic campaign" and "terrorizing practices" it would be difficult to know what else the legislature of Washington could have had in mind in using these words in its statute. Parenthetically, it should be noted that ASCAP succeeded in defeating Mr. Jones. The risk of having to pay the judgment of over $73,000 was too great and he signed an ASCAP license (R. 49, Settlement Agreement).

## Appellees Have Misused Their Copyrights in Violation of Public Policy and the Federal Anti-Trust Laws

Specification of Errors 2, 20, 31, 32, 33, 35, 42

### *Introduction*

The plaintiffs, through their conduct as described hereafter, are guilty of two distinct malpractices, either of which constitutes a defense, and either of which is grounds for injunctive relief and damages.

*First.* The plaintiffs are unlawfully extending their copyright monopolies. *Morton Salt Co. v. Suppiger,* 314 U.S. 488 (1942); *Hazeltine Research, Inc. v. Zenith Radio Corporation,* 239 F.Supp. 51 (1965); *M. Witmark & Sons v. Jensen,* 80 F.Supp. 843 (D. Minn. 1948) and cases cited therein.

*Second.* The plaintiffs are violating Sections 1 and 2 of the Sherman Antitrust Act, by pooling copyrights, price fixing, sharing fees, block booking, and monopolization of performing rights. *United States v. Loew's, Inc.,* 371 U.S. 38 (1962); *Northern Pac. R. Co. v. United States,* 356 U.S. 1 (1958); *United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948); *International Salt Co. v. United States,* 332 U.S. 392 (1947); *Mercoid Corporation v. Mid-Continent Investment Co.,* 320 U. S. 661 (1944); *Hazeltine Research, Inc. v. Zenith Radio Corporation,* 239 F.Supp. 51 (1965); *M. Witmark & Sons v. Jensen, supra; Alden-Rochelle, Inc. v. ASCAP,* 80 F.Supp. 888 (1948); *Alden-Rochelle, Inc. v. ASCAP,* 80 F.Supp. 900 (1948).

Abuses of the patent and copyright privilege are classic violations. Early and late court decisions without exception condemn pooling copyrights and patents when licensing through a central agency which imposes competitive restraints, (See e.g., *United States v. Masonite Corp.,* 316 U.S. 265 (1942)) and tying agreements as in the *Loew's* case, *supra,* the *Zenith Radio* case, *supra,* and others cited before and hereafter.

A copyright owner is entitled to exercise the same rights that any other seller of property enjoys. But he cannot exercise his copyrights as a part of a larger plan to violate the antitrust laws. He cannot do as appellees and the other members of ASCAP, namely pool and extend his single monopoly of a particular piece of copyrighted music to create another vastly larger and more powerful monopoly. *United States v. Loew's,* 371 U.S. 38 (1962); *M. Witmark & Sons v. Jensen,* 80 F. Supp. 843 (D. Minn. 1948); *United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323 (SDNY 1946); appealed 334 U.S. 131. He cannot grant or refuse to grant licenses pursuant to an agreement with competitors—other copyright owners—to regulate competition. *United States v. Gypsum Co.*, 333 U.S. 364 (1948); *Standard Sanitary Mfg. Co. v. United States,* 226 U.S. 20 (1912).

In short:

> "Patents give no protection from the prohibitions of the Sherman Act to such activities, when the licenses are used as here, in . . . [a] scheme to restrain." *United States v. New Wrinkle, Inc.;* 342 U.S. 371, 378 (1952).

No additional authority is needed for the proposition that patents and copyrights are treated the same with respect to abuse of the privilege granted. See, however, *United States v. Loew's,* 371 U.S. at 46.

The very nature of ASCAP's organization, its activities and its methods are so inimical to the Copyright Act and the antitrust laws that ASCAP and its members have been constantly embroiled in litigation. This turmoil has resulted in two court decisions that are exactly like the case at bar. These cases are *M. Witmark & Sons v. Jensen* and *Alden-Rochelle v. ASCAP, supra.* In addition to these two cases, there are, of course, many more decisions involving misuse of copyrights and patents which are in point. This will be discussed later, but of special significance are the very recent cases, *United States v. Loew's Inc.*, 377 U.S. 38, decided in 1962, and involving the offense of block booking of copyrights, and *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F. Supp. 51 decided in the Seventh Circuit in 1965, and involving patent pooling.

The defendant calls the above cases to the court's attention at this time because of their striking similarity to the present case and respectfully recommends that the court give them considerable study.

Turning now to the trial court's findings that appellees and ASCAP are not violating the antitrust laws or unlawfully extending their copyrights.

### *Unlawful Extension of Copyrights*

Specification of Errors 32

Appellant respectfully points out the clearest cases illustrating unlawful extensions of the copyright privilege. These are *Morton Salt Co. v. Suppiger*, 314 U.S. 488 (1942); *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944); *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F.Supp. 51 (1965); and *M. Witmark & Sons v. Jensen*, 80 F.Supp. 843 (D. Minn. 1948); *Alden-Rochelle v. ASCAP*, 80 F.Supp. 890 (1948).

No one can say it plainer than Chief Judge Nordbye in the *Witmark* case:

> "In view of the Court's finding that the copyright monopoly has been extended, it is not necessary to determine whether antitrust violations alone would deprive plaintiffs of the right to recovery . . .
>
> "It follows, therefore, from the premises that plain-

tiffs should be denied any recovery herein." *M. Witmark & Sons v. Jensen,* 80 F. Supp. at 850.

Judge Leibell also spelled out the violations in the *Alden-Rochelle* decision:

"Many of the cases which held that patent owners may not combine their patents so as to extend the monopoly of the one patent by the monopoly of the other, state the legal principles which prevent two copyright owners from doing a similar thing. The leading cases, which hold that such a combination of patents constitutes an illegal restraint of interstate commerce, are reviewed in a recent decision, *United States v. Line Material Co., et al.,* 33 U.S. 287, 68 S.Ct. 550 (Quotation from case, which follows, is omitted herein.)" *Alden-Rochelle v. ASCAP,* 80 F. Supp. 890, 894 (1948).

Judge Goldberg said in 1962 in the *Loew's* case:

"The antitrust laws do not permit a compounding of the statutorily conferred monopoly." *United States v. Loew's, Inc.,* 371 U.S. at 52.

Judge Austin said:

"The reward sought by plaintiff from defendant for inventions to be licensed in no way related to the quality of the individual patents and under the package license each patent drew strength from others, thus unlawfully extending the monopoly of each." *Hazeltine Research, Inc. v. Zenith Radio Corporation,* 239 F. Supp. at 77.

"Plaintiff's offer to license its patents individually but at royalty rates far in excess of the package rate was never an alternative to its controlling policy to grant defendant a license only under all of its patents . . . This constituted an illegal extension of the patent monopolies." *Ibid.*

It seems unnecessary to state that appellees in pooling their licenses with others, offering only package licenses, and sharing fees, are clearly extending their copyrights unlawfully.

### *The Effect of the Per Se Rule*

There are certain contractual restraints which are condemned by Section 1 of the Sherman Act without the necessity of any exhaustive analysis of the facts. Here the courts have no discretion. These kinds of restraints are considered so odious as to be per se unlawful. In other words, as the Supreme Court said in *Northern Pac. Ry v. United States, supra:*

> ". . . there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. v. United States,* 356 U.S. at 5.

Thus, agreements between competitors whose purpose is to fix prices and those of copyright licensors pooling their copyrights together are unequivocally banned without inquiry to their effect on competition or their justification. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States v. Loew's, Inc., supra; Northern Pac. Ry. v. United States, supra.*

Notwithstanding the per se rule, the trial court in its findings attached great significance to the fact that the 1950 consent decree enables an applicant for an ASCAP license to petition the court to set a reasonable fee (R. 37, Fact 26, p. 7; R. 35, p. 4). The district court went on to say that pooling of copyrights and licensing through ASCAP is the only practical way for copyright owners to protect their rights (R. 37, Fact 25, p. 7). Appellees also emphasized in argument to the court that because joint licensing is the only "sensible" way to market music that this justified all the appellees' conduct and excused their activities (Tr. 120-150).

The answer to these assertions is that the per se rule applies and the court may not inquire into the reasonableness of the rate. The rate itself is immaterial. Further, the consideration of commercial convenience to the copyright holder is also immaterial. Therefore, the trial court's decision so far as it is based upon these considerations is in error.

**The reasonableness of rates is immaterial**

Specification of Errors 9, 10

Price fixing under the Sherman Act is illegal per se. Absolutely no justification can be shown:

> "The reasonableness or unreasonableness of the rates does not militate against the absolute control of ASCAP to fix prices. The vice of the arrangement is apparent because, as the Supreme Court stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129, '. . . the machinery employed by a combination for price fixing is immaterial.'" *M. Witmark & Sons v. Jensen*, 80 F.Supp. 843 at 849.

The *Trenton Potteries* decision is the landmark case for the proposition that reasonableness is no excuse. Most later decisions cite and rely upon its mandate as their touchstone:

> "The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable

> prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable. . . ." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927).

Thus, the trial court's finding that appellants have an absolute right to petition the court for a determination of a reasonable rate is immaterial to this case. The pricing devices established by paragraph X of the consent decree (Def. Ex. A-2) may satisfy the Department of Justice, but they do not satisfy the Supreme Court.

The decree cannot by any stretch of the imagination sanction pooling arrangements in derogation of the law, or deprive appellants of their rights bestowed by the Sherman Act. Yet as being used today, it actually encourages these practices.

**Convenience to the appellees is no excuse**

Specification of Error 9

> "To this defense the shortest answer is that the law does not allow an enterprise that maintains control of a market through practices not economically

inevitable, to justify that control because of its supposed social advantage [citing cases]. It is for Congress, not for private interests, to determine whether a monopoly, not compelled by circumstances, is advantageous. And it is for Congress to decide on what conditions, and subject to what regulations, such monopoly shall conduct its business." *United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295, 345 (D. Mass. 1953), Aff'd, 347 U.S. 521 (1954).

"The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly." *Mercoid v. Mid-Continent Invest. Co.*, 320 U.S. at 666.

In the most recent case, the court's ruling is quite clear:

". . . plaintiff cannot justify such use of the monopolies of patents, by arguing the necessities and convenience to it of such a policy." *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F.Supp. at 77.

"Whatever may be the asserted reason or attempted justification of Hazeltine, its efforts to compel defendant to accept a package of patents involved use of the patent or group of patents as a lever . . . Such a licensing scheme . . . is illegal. . . ." *Id.* at 77.

"If good business reasons and expressions of good intent would serve as a defense for restraining trade, the Sherman Act would be rendered impotent and would afford no aid to the free flow of commerce." *Id.* at 78.

In other words, inconvenience is the appellees' problem and not the courts' nor the appellant's, and again the trial court's emphasis and reliance on this feature is immaterial and in error.[14]

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14. We suggest, however, that appellees could police infringements through a cooperatively financed organization such as ASCAP, but without tying or coupling the protective efforts with unlawful pooling, price regulating, or sharing fees. A membership organization supported by dues could do the policing job.

**Effect on competition**

The effect of the per se rule is not only to declare commercial convenience and reasonableness of prices immaterial, it also has the effect of obviating the usual Sherman Act requirement of showing that the conduct in question has an adverse effect on competition.

> "Certain contractual restraints are usually condemned out of hand by the language of Section 1, without the necessity of any exhaustive analysis of the facts. Here the courts have little discretion. Restraints so presumed to be per se unlawful are those whose purpose or effect is solely to control the prices in or foreclose access to the market place. Thus agreements between competitors whose only purpose is to fix prices . . . and those of a licensor . . . unreasonably exercising leverage to tie a unique product to some other product have no objective other than to restrain trade and are necessarily banned if the language of Section 1 is to have any meaning. Again, transactions between competitors—regardless of primary purposes—whose principal effect is to cause an unnatural increase in the general level of prices in or arbitrarily to exclude other competitors from the market, in most cases are likewise viewed as undue restraints of trade which violate the section.
>
> " '. . . there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.' " Van Cise, Understanding the Antitrust Laws 24, 25 (1963), citing numerous cases for the above, and quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

A landmark case could not state the rule more clearly or unequivocally:

"Under the Sherman Act, a combination formed

> for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

In view of the above, the appellant is not required to show how appellees' conduct stifles competition. Nevertheless appellant will show later in this brief how in a real and practical way appellees' activities stifle competition.

### *Particular Violations of the Anti-Trust Laws*

ASCAP and its members are violating Section 1 and 2 of the Sherman Act despite the consent decree. ASCAP and its members are:

(a) extending their copyright privileges;

(b) fixing prices and stabilizing rates between individual copyright members in licensing performance rights;

(c) excluding non-member copyright holders from the market;

(d) tying the license of desirable music to undesirable music and poor music to valuable music.

(e) forcing full package licensing, and offering illusory and unreasonable alternatives.

The *Witmark* and *Alden-Rochelle* cases clearly establish these activities as violations, and nothing in the 1950 decree pertaining to broadcasters has changed this. The facts of the two cases are so like those in the case at bar that defendants will quote them at length.

### The *Witmark* decision

> "Plaintiffs in these cases are seeking (1) damages for alleged infringement by defendants of certain musical composition copyrights owned by plaintiffs, and (2) an injunction restraining future threatened

violation of these copyrights. Plaintiffs contend that defendants, who operate certain motion picture theatres, give public performance of those compositions for profit when showing certain films in their theatres without first obtaining from plaintiffs a license to perform publicly the compositions for profit. Defendants contend that plaintiffs are entitled to no relief upon the grounds that (1) plaintiffs have illegally extended their copyrights, and (2) plaintiffs' method of doing business is in violation of the Sherman Anti-trust Act, 15 U.S.C.A. § 1-7, 15 note. Unless these defenses can be sustained, it follows from the evidence that plaintiffs have established infringements of the musical copyrights referred to in the complaint and are entitled to an injunction, damages and counsel fees.

* * *

"There are some fifteen thousand theatres in the United States which obtain music performance rights from ASCAP. The performance rights of any musical composition controlled by ASCAP may be licensed singly, but it appears that ASCAP's copyrighted music is always licensed as a group under a blanket license from ASCAP. And while the copyright owners, including the plaintiffs herein, since the consent decree entered into in 1941 between ASCAP and the Federal Government may deal individually with anyone seeking a license for the performance of their composition publicly for profit, it seems that, in the licensing of the performance rights of the music integrated in a sound film, as a matter of practice theatre owners have but little opportunity to obtain licenses from the many individual copyright owners belonging to ASCAP who may have copyrighted music in the particular film purchased by the theatre owner. Defendants term the right of granting individual licenses by the individual ASCAP copyright owner as 'illusory' in that the motion picture theatre owner is generally required to buy his pictures for his theatre before he knows what copyrighted music may be contained therein. . . . and there is no deviation in the manner in which theatre owners obtain a license for the performance rights of copyrighted

> music. They all clear through ASCAP, and for years ASCAP has built up its business in this regard accordingly and with full knowledge of all of these circumstances. In fact, one of the witnesses, informed as to the methods of doing business in this regard, testified, and his testimony is not contradicted, that he had never heard of any theatre owner approaching anyone but ASCAP for performance rights where the music was copyrighted by an ASCAP member." *M. Witmark & Sons v. Jensen,* 80 F.Supp. at 844-845.

At this point it can be seen how similar the *Witmark* case is to the present case. The nature of the plaintiffs' actions and the defendants' contentions are identical. Both theatre owners and radio broadcasters must have ASCAP music (Tr. 165, 205, 264, 273). In both the copyright owner members of ASCAP could deal individually (R. 37, Facts 23, 24, 25, p. 7), and in both, as a matter of practice, they do not or will not. There is no deviation in the manner in which radio owners obtain performance rights licenses, and it is impossible for radio stations to contact copyright owners for individual licenses prior to playing each record (R. 37, Facts 24, 25).

Mr. Lincoln Miller testified, and the testimony is uncontradicted, that he has never heard of any radio broadcaster approaching anyone but ASCAP for performance rights (Tr. 165).

Continuing with Judge Nordbye's decision:

> "The United States Court of Appeals for this circuit has held in *Remick Music Corp. v. Interstate Hotel Co.,* (1946), 157 F.2d 744, at page 745, certiorari denied, 329 U.S. 809, 67 S.Ct. 622, 623, 91 L.Ed. 691, 1296, that the right to perform a composition publicly for profit and the right to record it are sep-

arate and independent rights.

* * *

"And because of the claimed right to split the licensing of the recording rights and performance rights, plaintiffs urge that the asserted extension of their copyrights is merely the copyright monopoly which has inured to them because of the advancement in the motion picture industry which has inaugurated sound films and devised the technique of integrating the sound script with the background of music and songs . . . By placing the control of performance rights for motion pictures in a Society maintained by them, they have obtained a potential economic advantage which far exceeds that enjoyed by one copyright owner. The power, although it may be argued it has been benevolently exercised in the past, nevertheless fully exists. Through ASCAP, these plaintiffs and their associates by a refusal to license, or by the imposition of an exorbitant performance license fee, can sound the death knell of every motion picture theatre in America. That it would not be good business economics for them to do so does not mitigate the economic advantage which these plaintiffs have obtained in addition to that which is granted to them by their lawful copyright monopoly. Free competition among the members of ASCAP to license individually their music is effectively curbed, if not completely obliterated, by the scheme of operation which the members of ASCAP have adopted . . . The pooling of all license fees obtained from the licensing of some 80% of all sound music in motion pictures and the sharing of the revenues thus obtained permit each copyright owner to enjoy the benefits obtained by other copyright owners. So it will be seen that plaintiffs have also tied their copyrights with other copyrighted music and thus have shared in the rewards which are obtained from other copyrighted material.

* * *

"Instead, therefore, of having a single monopoly of a particular piece of copyrighted music and the benefits which that might afford, every copyright owner of music in ASCAP obtains the added economic power and benefit which the combined ASCAP control gives to them and their associates. Obviously, no one copyright owner would have the monopolistic power over the motion picture industry which ASCAP now enjoys.

* * *

"However free plaintiffs and their associates in ASCAP may have been from any design or intent to extend their copyright monopoly, or however beneficial it may be for them to carry on their business in this manner, or however inconvenient it may be for them to function otherwise, such facts and circumstances will not permit them to enlarge their lawful monopoly. As stated by the Supreme Court in *B. B. Chemical Co. v. Ellis,* 314 U.S. 495, 498, 62 S.Ct. 406, 408, 86 L.Ed. 367: "'. . . The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant.'

"It is the collective acts and agreements of plaintiffs and their associate members which have diverted their copyrights from their 'statutory purpose and become a ready instrument for economic control in domains where the anti-trust acts or other laws not the patent statutes define the public policy.' *Mercoid Corporation v. Mid-Continent Inv. Co., supra,* 320 U.S. at page 666, 64 S.Ct. at page 271. Refuge cannot be sought in the copyright monopoly which was not granted to enable plaintiffs to set up another monopoly, nor to enable the copyright owners to tie a lawful monopoly with an unlawful monopoly and thus reap the benefits of both.

* * *

"It seems undeniable that there is no competition among ASCAP members. Competition is effectually restrained because all licenses are granted by ASCAP under its control and domination. All earnings derived from licenses are pooled and divided among the members . . . And while it is contended that the present rates arrived at in February, 1948, were acquiesced in by some twelve thousand motion picture exhibitors as being fair and reasonable and that they were willing to execute contracts with ASCAP thereunder, the price fixing power was nevertheless vested in ASCAP. The reasonableness or unreasonableness of the rates does not militate against the absolute control of ASCAP to fix prices. The vice of the arrangement is apparent because, as the Supreme Court stated in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S. Ct. 811, 844, 84 L.Ed. 1129, '. . . the machinery employed by a combination for price fixing is immaterial. Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.'

"It cannot be denied, therefore, that plaintiffs and their associates, acting in concert through ASCAP, fix prices and completely control competition and thereby restrained trade in violation of Section 1 of the Sherman Anti-trust Act which declares illegal 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states.' Moreover, it seems inescapable on this record that plaintiffs, through ASCAP, have achieved monopolistic domination of the music integrated in the sound films in the motion picture industry and have effectively monopolized that part of trade and commerce in violation of Section 2 of the Sherman Anti-trust Act." *M. Witmark & Sons v. Jensen*, 80 F.Supp. 847-850. (Emphasis added)

### The *Alden-Rochelle* decision

"So that ASCAP might act for all its members most effectively, each member assigned to ASCAP the non-dramatic performing rights of his copyrighted musical compositions. The sums that ASCAP collected were kept in a common fund and a division of the proceeds, less expenses, was made at regular intervals. The division was one-half to the publisher members, and one-half to the composer and author members.

"ASCAP is governed by a board of directors of 24 members. Prior to 1941 they were self-perpetuating, but since then 12 members are selected by the publishers and 12 by the composers and authors. The 12 who represent the publishers determine how the publishers' share of the fund shall be divided among the publishers; the 12 directors who represent the composers and authors perform a like service in allotting their respective shares to the composers and authors. From their determination there is a right of appeal to the Board of Appeal; and from its decision an appeal may be taken to the full board of directors.

"The division of the publishers' share among the publisher members is based upon the popularity, earning capacity, seniority and the number and quality of the compositions in a publisher members' catalog. Popularity or vogue is determined by a survey of the compositions played over certain broadcasting chains in a given period." *Alden-Rochelle v. ASCAP*, 80 F.Supp. at 891.

This is exactly the same procedure ASCAP follows today. See Articles of Association of ASCAP, Article IV and Article XV, Sec. 1(c) (Def. Ex. A-4).

As in the present case, the court also found that individual per piece licensing would be impracticable.[15]

15.

"A 'per piece' license would be commercially impracticable. Exhibitors frequently contract for films before they are produced. The 'cue sheets' for the film are made available when the picture is released for exhibition purposes. They list the musical compositions included in the picture. The extra labor and great expense of getting 'per piece' licenses for the musical compositions on a film is evident when we consider the film needs of an average neighborhood house, which exhibits two double feature shows weekly. Each feature contains parts or selections from about 20 musical compositions. Eighty per cent of the musical compositions on films is ASCAP music. That would require 64 'per piece' licenses a week, not in-

Nevertheless, in *Alden-Rochelle,* the court found that ASCAP and its members were in violation of both Sections 1 and 2 of the Sherman Act:

> "Almost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theatres, involve a violation of the anti-trust laws. Although each member of ASCAP is granted by the copyright law a monopoly in the copyrighted work it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights." *Ibid.*

### The significance of *Alden-Rochelle* and *M. Witmark & Sons*

Faced with the rulings of *Alden-Rochelle* and *Witmark,* the conclusions of the trial court in this case that commercial expedience is an excuse and that the anti-trust laws have not been violated are incredible. If not, then the *Alden-Rochelle* and *Witmark* cases should be reversed and the principles upon which they are founded declared no longer the law.

### ASCAP's price fixing in the broadcasting industry
(Specification of Error 10)

As previously established, not only does ASCAP's board of directors initially determine the fees charged (R. 30,

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cluding licenses for music which is used on newsreels and short subjects. Exhibitors naturally prefer a blanket license good for a year, covering all musical compositions controlled by ASCAP. For a 'per piece' license ASCAP charges $10.00, plus. For a yearly blanket license the cost to the average neighborhood theatre is less than $100. Not a single theatre ever requested a 'per piece' license from ASCAP." *Id.*, at 893.

Fact 24, p. 6), but it also determines the type of licenses which will be offered.

"Q. The Board of Directors of ASCAP initially determines the license rates for ASCAP's repertory *and the terms* of the licenses, doesn't it?

"A. Yes." (Def. Ex. A-31g, testimony of Stanley Adams, President of ASCAP.) (Emphasis added.)

This is a form of price fixing regardless of the exact rate of the fee.

Furthermore, Stanley Adams, President of ASCAP, testified:

(a) One of the primary purposes of ASCAP is to assure the member a uniform price for his work. (Def. Ex. A-31g, p. 59)

(b) The rate charged for music has nothing to do with the type of music used. (Def. Ex. A-31g, p. 61)

(c) There is one rate charged to all stations, regardless of the amount of music each uses, the kind of music each uses, or the quality each uses. (Def. Ex. A-31g, p. 61)

The consent decree only requires ASCAP to issue two types of licenses—blanket and per program. The decree does not require that ASCAP issue any other kind of license, and it does not state that these are the only kinds of licenses ASCAP can offer. See *United States v. ASCAP*, No. 13-95 Amended Final Judgment, Section VI. (Def. Ex. 2).

Judge Sylvester J. Ryan, in a 1962 proceeding under the 1950 decree, held that the court administering the consent decree was powerless to compel ASCAP to issue different types of licenses from the two called for. The court held Section IX deals only with the procedure for determining reasonable fees, not types of licenses.

> "The entire Section IX, which speaks of a fee for the 'license requested' following application for a license . . . deals with the procedure for determining the reasonable license fees, not types of licenses. The words 'license requested' do not mean that an applicant for a license is given the right under the decree to compel ASCAP to give any type of license it demands and have the court fix the fee." *United States v. ASCAP*, In the Matter of the Application of Shenandoah Valley Broadcasting, Inc., Civil 13-95, *supra*.

Therefore, copyright owners, by their membership in ASCAP, in pooling their copyrights, are enabled through the selection of the form or type of license they chose to issue to in practical effect regulate and stabilize the prices at which they sell their copyrights. This is accomplished by refusing to calculate fees except by a percentage of gross revenues. All other kinds of licenses, such as per piece, licenses for specialty catalogues at reduced rates and clearance at the source by licensing recording companies, are denied. (See R. 30, Facts, 81, 82, 83, p. 14.)

ASCAP has effectively fixed the range within which music users can obtain licenses by formulating the type of license and the boundaries for assessments of fees.

> "Hence prices are fixed within the meaning of the Trenton Potteries Co. case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices, they are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940).

In *United States v. Socony Vacuum Oil Co.*, it was held that price fixing can be accomplished in many ways, for example where

> ". . . the means for price fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of a supply of the commodity for the purpose of keeping it from having a depressive effect on the markets . . ." *Id.* at 224.

Thus, the members of ASCAP have in concerted action agreed to offer only one form of license to broadcasters. This form calls for only one uniform method of payment, namely, on a selected uniform percentage of gross plus a uniform sustaining fee. This is price fixing pure and simple.

It has been stipulated, some stations desire and need only special styles or catalogues of music programming such as western, religious, "good music," classical and "top 40" (R. 30, Fact 81, p. 14). ASCAP does not offer licenses for special catalogues in order to satisfy these needs (R. 30, Fact 82, p. 14). Instead, by the bulk form of license ASCAP chooses to issue, broadcasters are required to subscribe to and pay for a catalogue of over one million compositions containing much music which is absolutely worthless to them. The vast portion of it is outdated, much of it is of a style most stations cannot use, most of it of inferior quality, and never had any value whatsoever for radio use (R. 30, Fact 83, p. 14).

Lincoln M. Miller, assistant president, Queen City Broadcasting Company, operator of KIRO, AM-FM and TV station, testified without contradiction as follows:

"Q. So you believe that the blanket license you have today from ASCAP is significantly cheaper than the cost would be to you then to take the kind of license you discussed?

"A. It is cheaper than that, certainly not higher. It is still—we are still paying for a lot of music we can't possibly use." (Tr. 173)

In *United States v. Masonite Corporation*, 316 U.S. 265 (1942), the defendants, who were patent holders, used cross-licensing agreements as the vehicle to pool their patents. The patent holders established a community device to sell their patented products. The method used was that each patent holder appointed the Masonite company to handle the sales of its products. As with ASCAP, Masonite set the initial prices and terms of sale.

The court in *Masonite* struck down the patentees' joint-selling device as a violation of the Sherman Act, saying:

> "Control over prices thus becomes an actual or potential brake on competition. This kind of marketing device thus actually or potentially throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition . . . the power of this kind of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal per se. If it were sanctioned in this situation it would permit the patentee to add to his domain at public expense by obtaining command over a competitor. He would then not only secure a reward for his invention, he would enhance the value of his own trade position by eliminating or impairing competition. That would be no more permissible than a contract between a copyright owner and one who has no copyright, or a contract between two copyright owners or patentees, to restrain the competitive distribution of the copyrighted or patented articles in the open market." *United States v. Masonite Corporation*, 316 U.S. at 281-282.

The right to have the court set a reasonable fee under Section IX of the consent decree is illusory. In the first place, the *Socony-Vacuum Oil Co.* decision states:

> ". . . the machinery employed by a combination for price fixing is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, at 223.

In the second place, it establishes an artificial method of price determination alien to the free play of the market place. By this device prices are not only stabilized within the rigid framework of the blanket formula ASCAP requires, but the actual fee imposed under these contracts is immediately insulated from competitive forces. Thus, copyright holders have neatly and effectively, under the guise of court supervision, pegged their prices within a given range and added the stabilizing influence of court administration.

For would-be users, the right to petition the court for reasonable fees is also illusory. The 1959 all-industry radio committee negotiations leading to determination of fees pursuant to paragraph IX of the decree took over a year and a half to complete. It is economically impossible for individual broadcasters to obtain a rate determination under paragraph IX. The legal fees alone would be more than the license fees defendants would have to pay for over a decade under the present forms of license.

Nor is appellant impressed with appellees' argument that after the 1950 decree the individual members of ASCAP have the right to license their music individually and all that ASCAP has is a non-exclusive right. This was no obstacle to Judge Nordbye or Judge Liebell:

> "In passing, it may be noted that the consent decree of 1941 permitting individual copyright owners

> to issue individual licenses for performance rights does not preclude a finding that ASCAP is in violation of the anti-trust laws in other respects." *M. Witmark & Sons v. Jensen,* 80 F.Supp. 843, 849.

The *Zenith Radio Corporation* decision is particularly appropriate to this argument. It opposes the trial court's conclusion that offering to license individual copyrights by individual owners (R. 37, Fact 25, p. 7; Fact 50, p. 15) and the fact that the license rights ASCAP has are non-exclusive justify the pooling device. (R. 37, Fact 21, p. 6)

In the *Zenith* case, the plaintiff sued for infringements, and defendant Zenith asserted that plaintiff was misusing its patents in violation of public policy and the Sherman Act, Sections 1 and 2, and it "... therefore, came into this court with unclean hands and is therefore barred from receiving any relief ..." *Hazeltine Research, Inc., v. Zenith Radio Corporation,* 239 F.Supp. at 69. As in the present case, the plaintiff had through the years accumulated a huge number of patents for licensing the electronics industry. Royalties were required to be paid on the licensees' entire production, whether its products employed any or many of the plaintiff's patents. As in the present case, the license was in effect a covenant not to sue the licensee or its customers should the plaintiff determine there was an infringement. *Id.* at 69, 70. (Compare the standard ASCAP licenses, Def. Ex. 9.) During the course of attempting to have Zenith sign a full package license, the plaintiff offered several alternatives of less than full packages but at unrealistic rates. Zenith refused them all and was sued for infringement. (See various offerings by the plaintiffs, *Id.* at 70-72.) The court said of the various alternatives:

"Plaintiff's offer to license its patents individually but at royalty rates far in excess of the package rate was never an alternative to its controlling policy to grant defendant a license only under all its patents. Rather, it was proposed by Hazeltine in the later stages of its negotiations in the instant case to cloak the harshness of the original demand by seemingly meeting the request of defendant in that regard. Although it may be said that the Hazeltine proposals on the surface were offers to treat of individual patents, the design was quite apparent—to force by unlawful coercion the acceptance of unwanted patents. This constituted an illegal extension of the patent monopolies. Whatever may be the asserted reason or attempted justification of Hazeltine, its efforts to compel defendant to accept a package of patents involved the use of one patent or group of patents as a lever to compel the acceptance of a license under others. Such a licensing scheme under applicable decisions of the Supreme Court is illegal and constitutes a misuse of the patents involved." *Id.* at 77.

**Blind selling practices and block booking**

There is absolutely no way for a broadcaster to know at any given time whether a particular composition is in the ASCAP repertory. ASCAP's pool of over a million copyrights is far too vast for any individual broadcaster to cope with. ASCAP's repertory changes literally from minute to minute (R. 37, Fact 23, p. 7). Therefore, if a broadcaster signs one of the two forms of ASCAP blanket licenses he still doesn't have protection from infringement, which is the only value of the licenses.[16] These facts spell out a case of blind selling practices. These practices were condemned in the *Witmark* and *Alden-*

16. If records were cleared at the source by recording companies (which the ASCAP Membership Agreement prohibits, see argument later in this brief), there would be no problem. This is the practice in the movie industry, as a result of the *Witmark* and *Alden-Rochelle* cases, and the subsequent amendment of the consent decree in 1950.

*Rochelle* cases, about which cases enough has already been stated.

The *Witmark* and *Alden-Rochelle* courts also found ASCAP's members in violation of the Sherman Act for block booking activities.

> "By pooling their rights and pooling the license fees derived therefrom, each in some way shares in the copyrighted work of the others. This has all the evils of 'block booking' which was analyzed and condemned in *U. S. v. Paramount Pictures,* D.C. 66 F. Supp. 323 at pages 348-349, and in the opinion of the U. S. Supreme Court May 3, 1948." *Alden-Rochelle, Inc., v. ASCAP,* 80 F.Supp. at 895.

Appellees are still today pooling their rights and nothing has changed since these decisions.

A more recent pronouncement condemning block booking is the case of *United States v. Loew's, Inc.,* 371 U.S. 38 (1962). In the *Loew's* case the United States brought separate anti-trust actions against six major distributors of copyrighted movie films for television exhibition, alleging that each defendant had engaged in block booking in violation of Section 1 of the Sherman Act. The complaints asserted that the defendants had, in selling to television stations, conditioned the license or sale of one or more feature films upon the acceptance by the station of a package or block containing one or more unwanted inferior films.

As in the present case, the appellees claimed they offered licenses for individual films. In the *Loew's* case the television stations had indeed requested licenses for individual films. The court found the various offers to license individual films were actually illusory. (Cf. the *Zenith Radio* case, *supra.*)

This is the same situation that exists in the music industry. It would be a "useless and futile act" for appellant to request a per piece license (No. 30, Fact A.F. 27, p. 16). Making a request is not significant anyway, because, as noted in *Alden-Rochelle,* 80 F.Supp. at 893, "Not a single theatre ever requested a 'per piece' license from ASCAP."

Broadcasters on numerous occasions have requested per piece licenses from ASCAP and the reply has been silence (Def. Ex. A-15 to A-22, letters requesting per piece licenses). The fact is that there is not a single per piece license existing between any of the numerous appellees herein, or ASCAP, and any user of music in the State of Washington (R. 30, Fact 21, 26, 28, pp. 5, 6), and there aren't even any per program licenses (R. 30, Fact 62, p. 11). Whenever ASCAP writes broadcasters, no mention is made of the availability of per piece contracts (Def. Ex. A-24, being several letters from ASCAP to radio stations). More significantly, when ASCAP's and these appellees' lawyer threatened to sue several broadcasters in 1963, the demand was made that the station sign blanket licenses and no mention was made of the availability of per program or per piece licenses (Def. Ex. A-43).

**Tying agreements**

It has been stipulated in this case that each musical copyright is "unique" (No. 30, Agreed Fact 61, p. 11). In the *Loew's* case the court condemned tying agreements per se because of the unique nature of copyrights.

> "This case raises the recurring question of whether specific tying arrangements violate Section 1 of the

Sherman Act. This court has recognized that 'tying agreements serve hardly any purpose beyond the suppression of competition.' " *United States v. Loew's, Inc.,* 371 U.S. 38, 44 (1962).

A showing of market dominance is not required.

"The standard of illegality is that the seller must have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . .' *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 6. Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Id.* at 45.[17]

Note that the court stressed both "uniqueness" and the product's "desirability to consumers."

"Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power in the sense of Section 2 of the Sherman Act, it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market. This is even more obviously true when the tying product is patented or copyrighted, in which case, as appears in greater

17. The *Loew's* action was instituted under Section 1 of the Sherman Act, because Section 2 was not needed. In the present case, however, both would be applicable because ASCAP has market dominance. The *Loew's* case involved only a few dozen films rather than over a million copyrights like ASCAP—more than 50 per cent of all performances by stations are compositions controlled by ASCAP (No. 37, Fact 18, p. 5), music is essential to stations (Tr. 6) and without ASCAP music stations would not be able to operate (Tr. 165, 205, 246, 273).

detail below, sufficiency of economic power is presumed." *Ibid*, footnote 4.

"The requisite economic power is presumed when the tying product is patented or copyrighted, *International Salt Co. v. United States,* 332 U.S. 392; *United States v. Paramount Pictures, Inc.,* 334 U.S. 131. This principle grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against infringements of his patent. *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* 243 U.S. 502; *Carbice Corp. v. American Patents Dev. Corp.,* 283 U.S. 27; *Leitch Mfg. Co. v. Barber Co.,* 302 U.S. 458; *Ethyl Gasoline Corp. v. United States,* 309 U.S. 436; *Morton Salt Co. v. G. S. Suppiger Co.,* 314 U.S. 488; *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U.S. 661. *Ibid.* at 45 and 46.

In *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 156-159, the principle of the patent cases was applied to copyrighted films which had been block booked into movie theatres:

"It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses." 334 U.S. at 158.

The block booking practices of ASCAP completely thwart any possibility that each composition should stand on its own footing and command its own value in the market place.

Appellees, by maintaining membership in ASCAP, frustrate the purpose of both the copyright laws and the antitrust laws. For example, the two forms of ASCAP blanket licenses offered in this state include a "sustaining fee." This is a flat fee that is related to nothing. It is like a poll tax, or a penalty, and all music—good and bad—shares in the charge.

Appellees even admitted in the pretrial order that:

> "The performance rights to some music in ASCAP repertory is vastly more valuable than the performance rights to other music in ASCAP's repertory, and of all the millions of musical compositions copyrighted a very few become hits or of any significant value. This is also true of the performance rights to music written by plaintiffs." (No. 30, Fact 83, p. 14.)

How can appellees justify the existence of ASCAP practices, or even ASCAP, in view of this obvious violation—poor music sharing in the rewards which should go to good music—good music subsidizing bad music? After a running battle in the depositions on this point, appellees finally conceded that it was impossible to even tell how much of the ASCAP revenue was attributable to any particular music, or from where the money came regarding any particular music (R. 30, Fact 85, p. 14).

The argument that the so-called "Per Program" license offers a meaningful alternative is rendered invalid by the

*Zenith Radio* decision:

> "Moreover, the reward demanded by plaintiff for a license under less than the full package of patents is in no way related to the quality of the patents since the price is determined solely by the number of patents chosen and most of the patents in the package are characterized by Hazeltine itself as 'insignificant.'" *Hazeltine Research, Inc., v. Zenith Radio Corporation,* 239 F.Supp. at 72.

By appellees' own admission,

> ". . . of all the millions of musical compositions copyrighted a *very few become hits of any significant value.* This is also true of . . . music written by plaintiffs." (No. 30, Fact 83, p. 14.) (Emphasis added)

The *Loew's* case demonstrates that particularly where copyrights are concerned little latitude will be condoned:

> "There may be rare circumstances in which the doctrine we have enunciated under Section 1 of the Sherman Act prohibiting tying arrangements involving patented or copyrighted tying products is inapplicable. However, we find it difficult to conceive of such a case, and the present case is clearly not one. . . .
>
> "Enforced block booking of films is a vice in both the motion picture and television industries, and that the sin is more serious (in dollar amount) in one than the other does not expiate the guilt for either." Loew's, Inc., *supra,* at 49 and 50.[18]

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18. The court disposed of one trial court's points and an argument appellees make herein. Appellees contend that the individuals stand ready to negotiate with the broadcasters (R. 37, Fact 50, p. 15). This is nonsense as a practical matter. Appellees contend that, because of the illusory possibility that someone might sometime try to locate some of the over 8,000 members of ASCAP for separate licenses, their whole colossal tying agreement is somehow cleansed:

> "Appellants . . . make the additional argument that each of them was found to have entered into such a small number of illegal contracts as to make it improper to enter injunctive relief. Appellants urge that their over-all sales policies were to allow selective purchasing of films and that, in light of this, the fact that a few con-

The *Loew's* and *Zenith Radio* cases also dispose of the argument that the ASCAP bulk licensing arrangement is somehow necessary to the industry.[19]

> ". . . tying arrangements, once found to exist in a context of sufficient economic power, are illegal 'without elaborate inquiry as to . . . the business excuse for their use,' *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5." *Id.* at 51 and 52. (See also, *Hazeltine Research, Inc., v. Zenith Radio Corporation, supra.*)

**Refusal to license performance rights with recording rights**

(Specification of Errors 2, 16, 17, 20-24, 20-25, 20-26, 20-28(c), 33, 34, 42-9)

***Particular contractual devices to restrain***

ASCAP's members have in force mutual restrictive agreements making it impossible for other and new methods

tracts were found to be illegal does not justify the entering of injunctive relief. We disagree. Illegality having been properly found, appellants cannot now complain that its incidence was too scattered to warrant injunctive relief. The trial judge, exercising sound judgment, has concluded that injunctive relief is necessary to prevent further violations." *Id.* at 50.

The foregoing case makes the present case *a fortiori*. Whereas the defendants in the *Loew's* case had many legal contracts and only a few illegal ones, the plaintiffs in relation to ASCAP have an immense tying agreement and virtually no competitive licenses.

Other reasons making the present *a fortiori* are: (1) ASCAP does not advise broadcasters that there are different licenses available to them, nor do appellees or other members of ASCAP (Def. Ex. A-24). (2) In Washington no other forms of licenses were filed with the Secretary of State as being available to broadcasters (R. 37, Fact 49, p. 15). (3) In the *Loew's* case film salesmen vigorously competed among themselves to sell their film lines, but ASCAP members never go into the field to sell their product (Def. Ex. A-31a, pp. 60-62).

19. We frankly don't know how anyone would know this since as far as broadcasters are concerned ASCAP preceded them and have never offered anything else as an alternative. ASCAP started doing business in 1914. By the time the broadcasting industry came on the scene ASCAP's economic power and market control was already complete. No alternatives could be tried or tested.

of marketing music to develop. The trial court found the following facts which were previously stipulated to by the parties:

> "Recording companies generally acquire only the recording rights to musical compositions." (No. 37, Fact 71, p. 19.)
>
> "At the time of the alleged infringement and now, there were and are no licenses in effect between ASCAP or any plaintiff and any recording company authorizing broadcasting stations to perform any musical composition publicly for profit." (No. 37, Fact 72, p. 19.)
>
> "ASCAP has never offered such to recording companies nor to defendants' knowledge has any such license ever been requested." (No. 37, Fact 73, p. 19.)
>
> "None of the plaintiffs has ever offered such licenses to recording companies nor to defendants' knowledge has any such license been requested." (No. 37, Fact 74, p. 19.)

ASCAP and its members control the rights of public performance of all musical compositions in ASCAP's repertory recorded with recording companies. This restraining feature, when applied to performance rights recorded or synchronized with movie films, was struck down by Judge Leibell in the *Alden-Rochelle* decree.

It is obvious why performance rights are not cleared at the source. This would require ASCAP's members to compete among themselves and bargain with recording companies on prices for clearance of performance rights. It was stipulated that composers and publishers actively compete to have their music recorded by recording companies and played by broadcasting companies (No. 30, Fact 70, p. 12). However, though there is competition among ASCAP members to have their music recorded in the first instance, there is no competition to sell performance rights because these are split off from the recording rights and licensed in bulk. (See Appendix "G" for testimony of one witness which demonstrates the paradox of radio stations being urged to play music on the one hand and then being forced to pay for the favor.) Herman Starr, president of one of the largest copyright owning publishing houses in the world, Music Publishers Holding Company, testified the members are not allowed to bargain when it comes to performance rights and their prices. (Def. Ex. A-3/a Deposition of Herman Starr, pp. 60-62.)

This refusal to bargain is accomplished by the ASCAP pooling device. It is further augmented by tacit understandings among the members not to clear performing rights when records are sold,[20] and by certain express contractual arrangements described in the following pages. Before describing these arrangements, an expression of the requirements necessary to show conspiracy is appropriate. The *Zenith Radio* decision gives the most recent expression:

> "It is fundamental that an unlawful conspiracy may be and often is formed without simultaneous actions or agreement on the part of conspirators. Acceptance of an invitation to participate in a plan, the necessary consequence of which, if carried out, is to re-

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20. During the trial Mr. Herman Finkelstein, General Counsel for ASCAP since 1943, testified that it is his business to be informed on all contracts negotiated and used in the music business, and that, accordingly, he knows that no contracts exist or have ever been requested which provide that a radio station would be authorized to perform musical compositions by a recording company (Tr. 333, 334). This is strong circumstantial evidence of a tacit understanding among members not to issue such licenses to recording companies and that it is Mr. Finkelstein's duty to keep track of these matters and to see that none of ASCAP's members do so license recording companies.

strain commerce, is sufficient to establish a conspiracy under the Sherman Act. Knowledge of a scheme that illegally restrains trade and participation in the plan without such knowledge is all that is required to establish a conspiracy under the antitrust laws and prior agreements need not be shown to have been made between each and all of the conspirators in order to establish a violation of the Sherman Act." *Hazeltine Rescant, Inc., v. Zenith Radio Corporation*, 239 F.Supp. at 77.)

"The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts but only by looking at it as a whole." *Id.* at 78.

### *The uniform popular songwriters contract*

The Uniform Popular Songwriters Contract is the standard form of agreement used between composers and publishers. It contains this restrictive provision:

"All performance rights are . . . subject to any existing agreements between any of the parties hereto and the American Society of Composers, Authors and Publishers." (Def. Ex. A-12, 1947 revised agreement attached to Lew Brown-Elbee Production, Inc., contract, which has been stipulated as a standard form of agreement used in the industry today and by the appellees herein now.)

### *Standard form of recording contract*

The standard clause found in agreements between ASCAP's members and recording companies expressly withholds performance rights thereby making it impossible for broadcasters to obtain performance rights with the purchase of records:

"This agreement is entered into with the understanding and agreement that nothing herein contained shall be deemed to free the phonograph record manufactured pursuant to this license from further contribution to the copyright in the event of its being used for performance for profit." (See Def. Ex. A-41 and A-42, Forms of Agreement used by Chappell & Co., Inc., and Herman Starr's companies with recording companies, and stipulated to be the standard forms prevalent in the industry.)

### *Contracts with advertising agencies requiring ASCAP licenses*

Another contractual device used to restrain competition among ASCAP's members is found in licenses with advertising agencies which record commercial radio jingles using copyrighted music.[21]

By insertion of the following clause in their agency contracts, the members of ASCAP refuse to clear the performance rights for broadcast and go one step farther. They prohibit the use of the commercial on a radio station unless the station has first obtained an ASCAP license:

> "All or any part of said musical composition when broadcast shall be broadcast only on radio and television networks and local stations having appropriate licenses therefor from the American Society of Composers, Authors and Publishers (ASCAP) in the United States, or the Composers, Authors and Publishers Association of Canada Limited (CAPAC), in Canada. Broadcasts of all or any part of said musical compositions over radio and television networks and local stations not licensed by ASCAP in the United States or CAPAC in Canada are subject to clearance of the performing rights from ASCAP, CAPAC, or

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21. Some of ASCAP's members, including some of the plaintiffs herein, have received thousands of dollars from advertising agencies or other commercial users for the right to use one musical composition as a radio or television commercial (R. 30, Fact 57, page 23C). One advertising agency paid almost $100,000 for the right to use one song published by one of the plaintiffs as a commercial (R. 30, Fact 58, page 23C).

> us." (Def. Ex. 38. Agreement between Music Publishers Holding Corporation and J. Walter Thompson Company, dated January 7, 1958, and stipulated to be an example of the kind of agreements ASCAP members generally use.)

This contractual device has several restraining features. It is an example of mutual agreement among ASCAP publishers not to clear performance rights at the same time the recording right is granted. Instead, the two are split. This coerces a broadcaster to obtain an ASCAP license if he wants the advertiser using the commercial to use his station. An advertising agency which places orders for time with broadcasting stations, by reason of the agreements, cannot and will not buy time from a station which does not have an ASCAP license.

A dramatic example of this coercion came to the appellant's attention after the trial. Attached hereto in Appendix "I" is a letter from McCann-Erickson, Inc., the agency handling the Humble Oil & Refining Company account, refusing to place an order with a Washington radio station unless it has an ASCAP license. (Letter dated February 14, 1962, from McCann-Erickson, Inc., to Radio Station KWYZ.) The same refusal was also sent to one of the defendants after the trial date. (See Appendix "I".) (Error for refusal to admit.)

The above contractual restraints are illegal under the Sherman Act. As previously stated, this practice of splitting performance rights and recording rights was struck down in the film industry. In both the *Witmark* and *Alden-Rochelle* cases the courts condemned the practice of movie producers requiring exhibitors to have ASCAP licenses before they could show films.

In entering a judgment against the ASCAP members, the court suggested the following solution:

> "Undoubtedly, the simplest plan for the copyright owners belonging to ASCAP would be for them to issue both synchronization rights and performance rights to the producers. This would provide a free competitive market in the motion picture industry for all copyright owners of music suitable for use in sound films. That the cost of the performance license would be passed on to the theatre owner is entirely probable, but plaintiffs would not be using their copyright privilege contrary to the public interest." *M. Witmark & Sons v. Jensen*, 80 F.Supp. at 850.

As a result of this in the sequel *Alden-Rochelle* decision Judge Leibell put the following in his decree:

> ". . . Plaintiffs are entitled to injunctive relief under title 15 U.S.C. § 26 (15 U.S.C.A. § 26), as follows:
>
> "(e) Restraining ASCAP and its members from conspiring with motion picture producers for the purpose of including a clause in contracts issued by producers to exhibitors directly or indirectly requiring exhibitors to obtain a license from ASCAP as a condition to the exhibition of licensed pictures." *Alden-Rochelle, Inc., v. ASCAP*, 80 F.Supp. at 902.[22]

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22. The decree as amended compelled ASCAP to issue to motion picture *producers* licenses for performance rights so that the films could be exhibited by the theatre *exhibitors* anywhere in the United States without obtaining a separate license (Para. V (C) of the consent decree of 1950. Def. Ex. A-2). Thus, movie exhibitors today do not need licenses from ASCAP for performance rights. They are cleared "at the source"—through the producers. The exhibitors ultimately pay for the performance rights in the cost of the film.

Similar to the Washington Copyright Protection Act, the consent decree orders ASCAP to issue licenses for performance for profit to film producers—at the source—"on a 'per film' basis." (Para. V (C) (3) of the 1950 consent decree. Def. Ex. A-2). In addition, the negotiations on a "per film basis" are expressly forbidden from being negotiated on an "industry-wide" basis (Para. IV (C) (3) of the 1950 consent decree. Def. Ex. A-2).

The broadcasting industry, it is interesting to note, demanded clearance at the source in the *Shenandoah* case, *supra*. The demand was made that the consent decree required ASCAP to clear films for tele-

ASCAP members also are guilty of giving those who request performance rights with recordings the "run-around" as the practice was characterized by Justice Goldberg in the *Loew's* case decided in 1962, and *Zenith Radio* decided in 1965. For example, Mr. Starr testified that when his publishing companies were asked to clear music performing rights in a pre-recorded program for later broadcast that if the potential licensee

> ". . . insisted upon being given a price, he could not afford this price, plus the various terms that [they] would have to tie in with the price." (Def. Ex. A-31(a) Deposition of Herman Starr, pp. 58-59.)

Appellees make it impossible for users to get clearance the source by the old shell game.

### *The Effect of Competition*

As shown previously, prices for musical copyrights in the ASCAP pool are fixed and stabilized because: (1) The ASCAP Board of Directors initially determines the fee and the terms of the license (R. 30, Fact 24, p. 6) (Def. Ex. A-31(g), p. 13); (2) Only one basic type of license is offered or required to be offered (R. 30, Facts 22, 28, 43, 44, pp. 5, 6, 9); (3) The form of license permits only one method of assessing fees—a percentage of gross revenues plus a flat sustaining fee (R. 30, Fact 23, p. 5, and Def. Ex. A-9); (4) ASCAP music is licensed only on a bulk basis and there is only one price for all music, regardless of its quality.

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vision use as well as theatre use. ASCAP opposed it on the ground that the broadcasters were not a party to the consent decree and have no standing to make the request. The Supreme Court of the United States upheld ASCAP, and held that only ASCAP itself, or the United States, the two parties to the decree, can intervene in the terms of the consent decree. See *Sam Fox Publishing Co. v. United States*, 366 U. S. 683 (1961).

The results of this artificial method of assessing fees are that on every dollar a broadcaster receives from the sale of his time, the copyright holder takes his tribute. No single copyright holder has the muscle to force a music user to pay on gross. It is only by placing the control of a vast number of copyrights in a performance rights society that the copyright holders have the power.

Let there be no mistake, the power still exists. This was eloquently demonstrated in 1959 when ASCAP brought the broadcasters to their knees by refusing to issue *any* licenses in the State of Washington. This fact is stipulated in the Pretrial Order:

> "In 1959 ASCAP *refused* to offer licenses to any broadcasters located in the State of Washington. (No. 30, Fact 73, p. 13) (Emphasis added.)

The appellees are ignoring the fact that music is not the only ingredient making up a broadcaster's product. The broadcaster sells an intangible complex composed of his announcers' voices, his disc jockeys' talent, and his news staff's efficiency (Tr. 269). A broadcaster takes great pains to see that his over-all station programming has a certain sound (Tr. 171) or style to compete against other stations seeking advertising revenues. The program sold to the time buyer is a complex, imaginative composite.[23] (Tr. 210, 305). No announcer can force a broadcaster to pay him tribute by requiring a percentage of gross

23. The testimony of Mr. James W. Wallace, President of KPQ, is pertinent:

> "I know exactly what music we play. We have a list of it.
>
> "As to how I arrive at knowing what the music should be, I should give you a background (here the witness lists his qualifications to know his community) . . . and these things are all necessary for a small-town radio station man to know what the people want.
>
> "For one thing, almost 60 per cent of our income comes from sources other than music . . . but still we are obligated under any

sales. No newscaster or sportscaster can. No sales manager can successfully demand "To have my services you must pay me a percentage of your gross." Only the music composer can exact such tribute and pirate management's imagination, the disc jockey's personality, the newsman's skill and the sales manager's ideas.

Furthermore, this point is clear. Every witness called by the defendants testified he could not successfully operate his station without the music controlled by ASCAP (Tr. 165, 205, 246, 273, 314). Appellees offered no evidence otherwise.

Once a broadcaster has a blanket license encompassing over a million copyrights, only a minute percentage of which he can possibly use, he has no incentive to deal with individual composers. Thus, unknown individual songwriters are effectively screened from the market. Those composers not members of ASCAP have no means of selling their songs to broadcasters, the most important means for popularizing music (Tr. 24, 25, 26, 169, 317-319).

But for ASCAP's existence, the individual copyright owner would be required to find another and lawful method to market his music and to do so he would have

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> contract offered us by ASCAP to pay on the total amount and not on that portion of the music used." (Tr. 210-211).

One witness testified that on his station only 44 per cent of the station's revenues come from programs where music is involved (Tr. 225). He further stated:

> "Our principal revenue comes from news, sports, politics and programs and announcements that pay a premium rate to be adjacent to news." (Tr. 226).

Furthermore, it was stipulated that broadcasters must offer diverse programming. If they broadcast only music, the Federal Communications Commission could question their right to operate (Tr. 16-17).

to price it also.[24] The free play of competition would provide a solution as happened when Judge Leibell freed motion picture exhibitors from ASCAP's restrictive practices and required licensing at the source. The same solution would come if recordings were cleared at the source.

As previously pointed out, stipulation and testimony in the trial established that composers are anxious to have stations play their music, but there is no individual bargaining or negotiating between broadcasters and composers (Tr. 24, 25, 26, 169). Herman Starr, president of Music Publishers' Holding Corporation, the holding company owning 100% of the stock of several of the appellees herein and a member of the Board of Directors of ASCAP for 25 years, testified not only is there no competition among the ASCAP members, but, indeed, their employees are forbidden to talk price because ASCAP is the only one allowed to do so.

"Q. Will you answer the question, please?

"A. They have nothing to do with price.

"Q. That is fixed by the ASCAP license, isn't it?

"A. Yes, it is not within their scope to talk price. These are people who go out to exploit music. They are not salesmen." (Def. Ex. A-312, Dep. of Herman Starr, pp. 60-62)

Appellees and the trial court relied heavily upon the

24. Testimony of Mr. Lincoln Miller, Assistant President, KIRO AM-FM-TV:

"We try to adjust what we call the sound because it is different from other stations so we might want to play all western or all religious, so in the case of our station (KIRO, Seattle) we try to balance with a little bit of everything, but if we knew what the price tags were, this could well influence the kind of music we play and balance with the kind of music we play. It would certainly influence our decision because the economics would be right in front of us. We would be free to determine." (Tr. 171, 172).

stipulated fact that it would be commercially impossible for broadcasters to negotiate with each individual copyright owner for each composition played (No. 30, Fact 56, p. 10; No. 37, Fact 25, p 37; No. 25, Memo. Opinion, pp. 5-6). Yet, appellees offered no evidence that other marketing methods such as clearance at the source on records are impossible or for that matter impractical. Broadcasters testified that if records were marked and the performing rights cleared with the recording rights, it would be a simple matter for them to operate and pay performance rights fees with the purchase of records, and they would welcome the opportunity to do so. (See Appendix "H" at pp. 284, 306 for text of testimony.) Music received from networks is cleared at the source, as is background music and music on motion picture films (No. 30, Fact 59, p. 11). This demonstrates that licensing at the source is workable if only given a chance.[25]

Although the trial court apparently chose to ignore it, several experienced broadcasters testified that licenses using a fee schedule based upon per piece rates would be workable so long as price lists were available (Tr. 170-171, 210-211, 266, 268-269, 284, 303-307). (See text in Appendix "H.")

### *Monopolization—Violation of Section 2*

The appellant next calls the court's attention to appellees' violation of Section 2 of the Sherman Act. Testimony shows that ASCAP controls almost all the copy-

25. That this licensing at the source works is shown by European practice of having the recording company licensee pay fees to the copyright owner in ratio of the sales of the copyright owner's records to the total sales of records by the recording company. Shemel and Krasilovsky, *The Business of Music*, 22 (1964).

righted show tunes in the country. Show tunes or popular standards, the uncontroverted testimony shows, are the bread and butter of the defendants' programming. Without them defendants will die. Thus ASCAP has effectively monopolized the show tune market, not to mention the general performance rights market. The act of monopolization is condemned by Section 2. See *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F.Supp. 295 (D. Mass. 1953), Aff'd, 347 U.S. 521 (1954).

Section 2 requires the courts to move against two acts, namely, an attempt by a single person (ASCAP) and conspiracies by two or more persons (the members) to monopolize. More than 50% of all performances of copyrighted music—not just show tunes—by broadcasting stations in the United States are licensed by ASCAP and are performances of compositions in which the copyrights are held by members of ASCAP (R. 37, Fact 18, p. 5). Therefore, ASCAP has violated Section 2 by its monopolization of music licenses and its members have violated the section by conspiring to monopolize. *Hazeltine Research, Inc., v. Zenith Radio Corp.*, 239 F.Supp. 51 (1965).

### Misuse of the Copyright Privilege Constitutes a Defense to Infringement Actions

(Specification of Errors 23, 25, 26, 29, 30, 35, 36, 37, 40, 41, 42, 44, 45, 47, 51)

Appellees contend that appellant's violations of the Washington law and the federal antitrust laws are not defenses to infringement suits; appellant contends that they are.

Appellees' contention is based upon two grounds—federal supremacy and that the doctrine of unclean hands is inapplicable.

### *The Effect of Violation of State Statutes*

As previously shown, the United States Supreme Court held that states have the power to regulate combinations of copyright owners notwithstanding the fact that copyrights flow from federal power. Federal bestowal of privileges does not mean federal bestowal of immunity from state law or bestowal of the right to misuse a privilege.

The Supreme Court said that statutes like Washington's were "... aimed at the power exercised by combinations of copyright owners over the use of musical compositions for profit." *Buck v. Gallagher,* 307 U.S. at 99. The court, in dealing with the question of supremacy of federal copyright laws over the state laws, held in a case involving a Florida statute like Washington's:

> "We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws . . ." *Watson v. Buck,* 313 U.S. at 404.

> "It is enough for us to say in this case that the phase of Florida's law prohibiting activities of those unlawful combinations described in Sec. 1 of the 1937 Act does not contravene the copyright laws or the federal constitution . . ." *Id.* at 405.

This disposes of the appellees' contention of federal supremacy and that the Washington law is unconstitutional.

Appellees urge that appellants, by resorting to the state statute as a defense, seek to deprive the appellees of their rights. The Washington Act does not prohibit the bringing of federal suits for infringement. The act only provides the copyright holders who choose to pool their interests and do business in Washington must license on a per piece basis in accordance with Washington laws. The Supreme Court suggests a course for those who complain about losing their patent rights to infringers:

> "Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned." *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 493 (1942).

Whether the Washington legislature's prohibitions against pooling, and issuing blanket licenses and requiring per piece licenses is considered by appellees or the District Court as workable, practicable, or fair is beside the point. (See Argument, *supra.*) It is not the prerogative of the music peddlers to tell the Washington legislature or Washington courts what is right, just, fair or reasonable. The copyright holders and the trial court are mistaken if they expect their subjective opinions of what is fair to supersede the Washington lawmakers' determinations.

The same can be said for the trial court's opinion that individual licensing is impossible because this would hinder the copyright owners in policing their rights and increase the cost of their administration (R. 35, 37, Fact 25, p. 5). The United States Supreme Court settled this by the doctrine that expediency is no excuse. (See Argument, *supra*, and several cases previously cited.) The following pronouncement clearly shows the error in the trial court's reasoning:

> "Nor is it within our province in determining whether or not this phase of the state statute comes into collision with the Federal Constitution or laws passed pursuant thereto, to scrutinize the act in order to determine whether we believe it to be fair or unfair, conducive to good or evil for the people of Florida, or capable of protecting or defeating the public interest of the state. These questions were for the legislature of Florida and it has decided them." *Watson v. Buck*, 313 U.S. at 403.

In *Leo Feist v. Young*, 138 F.2d 972 (7th Cir. 1943), a Wisconsin statute was urged as a defense to copyright infringement suits. The court held that violation of the statutes would not constitute a defense because the Wisconsin statute was a licensing statute ". . . not relevant or material to the issue presented by the complaint." *Leo Feist v. Young*, 138 F.2d at 976.

The Wisconsin statute did not involve the same public interest considerations as the Washington Act. It was not an antitrust statute as is Washington's. Furthermore, and very significantly, the Wisconsin statute did not make it is a crime for a user of music to deal with the plaintiffs.[26]

The *Feist* court stated that, had the Wisconsin statute been one protecting the public interest, as are the Washington statute and the federal antitrust laws, then the public interest must prevail over the interests of individual copyright holders:

> "In reaching our conclusion we have not overlooked the fact that the Supreme Court has recently

26. In Washington, RCW 19.24.100 and RCW 19.24.290 make it a criminal offense punishable by fine and imprisonment for anyone to sign blanket licenses or to deal with any violator of the act. The Wisconsin statute has no counterpart.

> stated that courts of equity may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. *Morton Salt Co. v. Suppiger*, 314 U.S. 488, 492, 62 S. Ct. 402, 86 L.Ed. 363, or many cases which hold that equity will not aid a law violator, or the fact that the maxim is applied, not to favor a defendant, but because of the interest of the public. But in most of these authorities the plaintiff was seeking to extend the scope of his lawful patent monopoly beyond the scope of the grant or was seeking equity's aid against the very statute which he had violated. Thus the illegal action, which warranted the application of the clean hands doctrine to preclude relief, was inextricably intermingled and connected with the cause of action or at least directly related to it, whereas here the violation of the Wisconsin statute was collateral to the cause of action and certainly not directly related to it." *Leo Feist v. Young*, 138 F.2d at 976.

Appellees' misconduct is related to the appellant's, inextricably intermingled and connected to the causes of action for infringements, and directly connected with the issues being litigated.

ASCAP and its members are violating the Washington Act by issuing blanket licenses. The very activities which the act condemns are the very reasons why the appellant is placed in the position of infringing. If the appellees were not violating the act, namely, issuing blanket licenses, the appellant could lawfully do business with them. It was clearly established by the testimony that stations must have ASCAP music to operate and stay in business. Appellant and all users of music in Washington are on the horns of a dilemma. If they are forced to take ASCAP's illegal blanket licenses, they will be violating Washington law. If they play music without an

ASCAP license, they will be sued for infringement. Although appellant must have ASCAP music to stay in business, there is no lawful or practical means offered to it to have the music.[27]

Their only alternative, therefore, is to close their stations and go out of business:

> "The injury to Zenith's business was occasioned by the necessity that defendant make a choice among alternatives each of which had an adverse economic effect on its business. It was forced either to cease manufacturing and selling its television receivers, pay tribute with consequent increase in its costs or incur the expenses incident to the defense of protracted patent litigation. Although defendant's choice determined the nature and amount of the resulting damages, it was the necessity of having to choose that occasioned injury." *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F.Supp. at 72.

### *The Effect of Misusing Copyrights*

In ruling that misuse of copyrights and patents renders the right granted unenforceable, the courts are applying old and tested equity principles. It does not matter really whether the abuses flow from violations of specific statutes such as federal antitrust laws. The principles applied are principles of basic fairness. One should not be allowed to forge a privilege beneficently bestowed into a tool to exploit others and foster one's own schemes in derogation of the rights of others. When patents or copyrights are being used to foster monopoly, rather than reward incentive and provide for the public good, courts invariably refuse their aid:

> "An illegal combination of copyrights and a pool-

27. It has been stipulated that it is impractical for defendants to deal with the thousands of individual copyright owners.

> ing of the proceeds derived from the licensing of the copyrights through the illegal combination, renders unenforceable the rights granted under the Copyright Act, at least while the illegal combination continues. See *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363; *B. B. Chemical Co. v. Ellis*, 314 U.S. 495, 62 S.Ct. 406, 86 L.Ed. 367, and *United States v. Line Material Co.*, 333 U.S. 287, at Page 310, 68 S.Ct. 550. . . ." *Alden-Rochelle, Inc. v.* ASCAP, 80 F.Supp. at 904.

The *Witmark* case is indistinguishable from the present case. The court could not have been more specific in clearly holding that unclean hands and abuse of copyright laws are defenses to infringement actions.

> "One who unlawfully exceeds his copyright monopoly and violates the antitrust laws is not outside the pale of the law, but where the Court's aid is requested, as noted herein, and the granting thereof would tend to serve the plaintiffs in their plan and scheme with other members of ASCAP to extend their copyrights in a monopolistic control beyond their proper scope, it should be denied." *M. Witmark & Sons v. Jensen*, 80 F.Supp. at 850.

A leading case is the *Mercoid* case which unequivocally teaches that patent abuses are a defense to an infringement action:

> "In those cases both direct and contributory infringement suits were disallowed on a showing that the owner of the patent was using it 'as the effective means of restraining competition with its sale of an unpatented article.'" *Mercoid Corporation v. Mid-Continent Investment Co.*, 320 U.S. 661, 665 (1944).

> "It is sufficient to say that in whatever posture the issue may be tendered courts of equity will withhold relief where the patentee and those claiming under him are using the patent privilege contrary to the public interest." *Id.* at 669.

To the same effect see *International Salt Co., Inc. v. United States,* 332 U.S. 392, 401 (1947):

> "In an equity suit, the end to be served is not punishment of transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints."

The same principles are applicable to copyright actions as they are to actions involving patents:

> "Since one of the objectives of the patent laws is to reward uniqueness, the principle of these cases was carried over into antitrust law on the theory that the existence of a valid patent on the tying product, without more establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anti-competitive consequences. E.g., *International Salt Co. v. United States,* 332 U.S. 392. In *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 156-159, the principle of the patent cases was applied to copyrighted feature films which had been block booked into movie theaters." *United States v. Loew's, Inc.,* 371 U.S. at 46.

The case of *Kobe, Inc. v. Dempsey Pump Co.,* 198 F.2d 416 (10th Cir. 1952) cert. denied 344 U.S. 837 (1952), is very much in point. In this case the plaintiff in an infringement suit was found to have monopolized the rodless oil pump industry by buying up all present and future patents in the field and extracting covenants not to compete from sellers. (Much like ASCAP has "bought" all the performance rights of its members and extracted covenants they will not license through anyone else (R. 30, Fact 68, p. 12), and with the understanding they will not compete). In affirming the trial court's treble damage judgment in favor of the defendant and its refusal to grant relief to the plaintiff because of patent misuse, the court stated, per Pickett, C. J.:

> "It is said that to allow recovery of the damages resulting from the infringement action would be a denial of free access to the courts. We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition." *Kobe Inc. v. Dempsey Pump Co.*, 198 F.2d at 424.

Again in the recent *Zenith Radio* case, the court granted the defendant a defense to infringement suits and allowed counterclaimed damages of several million dollars where it was shown the plaintiff had misused its patents and violated the antitrust laws. Relief and damages were awarded on the traditional grounds that the plaintiff came into "... court with unclean hands and is therefore barred from receiving any relief. ..." *Hazeltine Research, Inc. v. Zenith Radio Corporation,* 239 F. Supp. 51, 69 (1965).

There is another factor that should be called to the court's attention. It is not necessary for the appellant to show that the appellees have violated the antitrust laws for the court to grant appellant a defense. This distinction can be seen in studying differences between the *Mercoid* and the *Morton Salt* cases.

In *Mercoid* the Supreme Court expressed the mandate that one who misuses his patent privilege in violation of the antitrust laws must by the nature of his abuse of the patent privilege lose his right to protect that privilege by suit. Whereas in *Morton Salt,* there was no finding that the patentee had violated the antitrust laws. Nevertheless the court held:

> "It is unnecessary to decide whether respondent has violated the Clayton Act, for we conclude that in any event the maintenance of the present suit to restrain petitioner's manufacture or sale of the alleged infringing machines is contrary to public policy and that the district court rightly dismissed the complaint for want of equity." *Morton Salt Co. v. Suppiger*, 314 U.S. at 494. (See the discussion of these cases in Kintner, *An Antitrust Primer*, 86-87 (1964).

### *The Relative Culpability of the Parties*

Specification of Errors 3, 5, 6, 7, 13, 14, 21, 22

Without citing any authority, the appellees, during the trial and by memoranda, urged that although the activities of the copyright holders may have been less than lawful, the real culprits were the broadcasters. The trial court apparently accepted this argument. It ruled in its written opinion that notwithstanding the appellees may have been guilty of violating state or federal antitrust laws, their violations were minimal compared with the defendants' conduct (R. 35, Mem. Opin. p. 6; R. 37, Concl. 19, p. 24). The court's decision was made without citing a single case for its position. Whereas, appellant in its Post-Trial Memorandum (R. 33) cited much authority contrary to the appellees' assertion and the trial court's apparent decision.[28]

Appellant has been unable to find any authority for the court's determination that copyright infringement is more

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28. It is interesting to note that the appellant, by written memorandum, cited many cases showing that conduct like that of the ASCAP and its members was violative of the anti-trust laws and such abuses were defenses to infringement actions. The appellees in their memoranda cited no cases to the contrary, and the court cited none in its opinion. Yet, the trial court still found against the appellant on these issues.

blameworthy than copyright abuse and, therefore, the infringer must give ground to the abuser. On the contrary, all the cases cited above by the appellant are just the opposite.

The only assumption appellant can make is that the trial court made a subjective determination all on its own. Appellant is almost helpless to argue the matter because the trial court was silent in its opinion on both legal grounds and on its personal convictions for the determination. It would appear from lack of information that the decision was almost capricious and arbitrary.

In any event, the court's weighing of the relative culpability of the parties before determining whether the appellees' misconduct is a defense is in error. The courts do not agree with the trial court on this point. There has been no deviation in the decisions from the traditional concept recently enunciated by the Supreme Court:

> "This principle grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against infringements of his patent." (Citations omitted.) *United States v. Loew's, Inc.* 371 U.S. at 46.

The doctrine that abuses of copyright or patent privileges is a defense to an infringement suit could only have arisen after infringement had taken place. Without infringement, the principle would never have evolved.

The *Witmark* case was an infringement case, and the court said:

> "One who unlawfully exceeds his copyright monopoly and violates the antitrust laws is not outside the pale of the law, but where the Court's aid is

> requested, as noted herein, and the granting thereof would tend to serve the plaintiffs in their plan and scheme with other members of ASCAP to extend their copyrights in a monopolistic control beyond their proper scope, it should be denied." *M. Witmark & Sons v. Jensen,* 80 F.Supp. at 850.

The infringer's wrongdoing was recognized in the landmark *Mercoid* case by the Supreme Court:

> "And we may assume that *Mercoid* did not act innocently." *Mercoid Corporation v. Mid-Continent Investment Co.,* 320 U.S. 661, 664 (1944).

Justice Jackson stated in the case:

> "It is suggested that such a patent should protect the patentee at least against one who knowingly and intentionally builds a device for use in the combination and vends it for that purpose. That is what appears to have been done here. As to ethics, the parties seem to me as much on a parity as the pot and the kettle . . . The less legal rights depend on someone's state of mind, the better." *Id.* at 679-680.

Of course, much of this is beside the point, as is appellees' attempt to excuse their own illegal conduct by calling the defendants more blameworthy. The appellees and the trial court confuse the relative conduct of the parties with the substantive reason for denying the copyright holder relief. The paramount policy is the protection of the public against abuses of the copyright monopoly and from enabling copyright owners to ". . . carve out exceptions to the antitrust laws which Congress has not sanctioned." *Mercoid Corporation v. Mid-Continent Investment Co.,* 320 U.S. at 667.

> "It is the public interest which is dominant in the patent system . . . It is the protection of the public in a system of free enterprise which alike nullifies a

> patent where any part of it is invalid . . . and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly within the terms of the grant." *Id.* at 665-666.

Again the Supreme Court lays out the rule:

> "It is the adverse effect upon the public interest of a successful infringement suit in conjunction with the patentee's course of conduct which disqualified him to maintain the suit, regardless of whether the particular defendant has suffered from the misuse of the patent . . . The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of this grant by the courts where it is being used to subvert that policy." *Morton Salt Co. v. Suppiger*, 314 U.S. 488, 494 (1944).

> "Maintenance and enlargement of the attempted monopoly of the unpatented article are dependent to some extent upon persuading the public of the validity of the patent, which the infringement suit is intended to establish. Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated." *Id.* at 493.

As a most recent writer puts it:

> "The doctrine of misuse is grounded on a 'public policy' and may operate on equitable grounds to deny relief in a private suit for patent infringement." Kintner at 86.

Another point that the Supreme Court is making is that those injured by abuses of patents or copyrights should not be less protected by the antitrust laws than those injured by other violations. The antitrust laws were enacted by Congress to afford individuals like the broadcasters protection against just such combined abuses as these appellees and the other members of ASCAP are practicing. Indeed, the broadcasters testified that they have stood ready and willing to deal with the appellees and pay for performing rights if they just had the simple right to bargain as they do for other raw materials going into their product, or if they had the right to purchase performing rights with the purchase of records as the movie producers have. (See testimony in Appendix "H.")

If these appellees and the other members of ASCAP had not in the first instance combined their individual copyrights to gain tremendous economic power through control of over a million copyrights, the appellant would not be in court today, and would not be facing the bleak alternatives of breaking the law or quitting business. The appellees by the nature of their infringement actions are the first to ask this court for equitable relief. Were the injunction to be granted, equity would not only be aiding a lawbreaker, but would also coerce appellant to either violate the law or to forsake his enterprise:

> "Respondents ask the equity court for an injunction against infringement by petitioner of the patent in question and for an accounting. Should such a decree be entered, the court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the antitrust laws. It would aid in the consummation of a conspiracy to expand a patent beyond its legitimate scope." *Mercoid v. Mid-Continent Invest. Co.*, 320 U.S. at 670.

Again we see that public interest considerations are paramount and not the relative interest of private litigates or the relative nature of their deeds. (See also the *Zenith Radio* case, *supra*, where the infringer deliberately refused a bulk license and several alternative licenses and the court correctly held for the infringer and against the patent holder.)

As previously noted the trial court's Findings of Fact and Conclusions of Law are given little weight in this type of proceeding. It is so fundamental as not to need citation that the trial court's Findings of Fact must be based on evidence to support it unless stipulated. 5 MOORE'S FEDERAL PRACTICE 2609. There is not one word in the entire record relating to appellant, K-91, Inc., being in any way more culpable. Although the president of appellant, Mr. Nelskog, was present in court during the entire trial, appellees chose not to call him as a witness, nor anyone else from K-91, Inc. Although Rogan Jones was cross-examined concerning his refusal to license under ASCAP's methods, that is completely immaterial to this particular appellant. Mr. Jones was hardly the agent for K-91, Inc. These cases were separate cases consolidated for trial. The only evidence regarding K-91, Inc.'s refusal to license was stipulated:

> "Mr. Ronald Murphy: Mr. Jones and Mr. Nelskog and Mr. Wallace would testify for their stations that if the contracts which plaintiffs offer through ASCAP and by ASCAP were legal in this state and were legal under federal law, they would be prepared to do business with them and would sign the contracts.
>
> "The Court: They will stipulate that they would so testify.
>
> "Mr. Topkis: We want to cross-examine a little bit on that, Your Honor.
>
> "The Court: Very well." (Tr. 30)

No such cross-examination ever took place concerning appellant. The entire record as far as this appellant is concerned is that it was willing to license if the licenses were legal (Cf. *Zenith Radio* case, 239 F.Supp. 51 (1965)).

Yet the trial court found appellant failed to take a license only to avoid paying license fees. Specification of Error 3. There was no evidence to this effect.

The trial court also found appellant broadcast appellees' compositions for ten years on a regular basis. Specification of Error 6. There is no evidence to this effect. There is no evidence that K-91, Inc. was even in existence for ten years.

Again, there was no evidence as the court found in appellant's Specification of Error 14 that K-91, Inc. failed to take a license only because it wanted to avoid paying license fees. Not only does the only evidence demonstrate K-91, Inc. would license if the licenses were legal, but in fact the defendants did pay fees that went to the appellees through networks (R. 30, Pre-Trial Order, Admissions Nos. 1 and 2; Tr. 248).

Again, the trial court found that K-91, Inc., which has not been in existence for ten years, committed numerous other infringements of plaintiffs' copyrighted compositions during the last ten years. Specification of Error 22.

In short, this case was tried primarily on the issue of appellees' conduct. The trial court recognized at least "minimal" violations of the federal antitrust laws on the part of the appellees (R. 35, Mem. Op., p. 6), but then found all defendants to have been the real culprits. There was not one word in the entire record that K-91, Inc. did anything even suggesting it more blameworthy, or that it even existed for ten years—which it didn't. As previously set forth, the cases demonstrate that in patent and copyright infringement cases the issue isn't whether or not the defendant infringed. *That is always conceded.* The issue is whether the plaintiff has so abused his copyrights as to preclude recovery from the infringer who has in *all of these cases* refused to be a party to an illegal arrangement and taken the only available alternative—infringement.

### *The Effect of the Consent Decree*

Specification of Errors 43, 46 and 47

We have discussed the pertinent cases at length herein and will not repeat them except in the briefest manner. For instance, we have already seen that the consent decree was in effect at the time of the *Alden-Rochelle* and *Witmark* cases. In both cases, the courts gave due recognition to the fact that ASCAP and its members were subject to a consent decree and that the performance rights assigned to ASCAP were granted on a non-exclusive basis because of the consent decree. Both courts still found ASCAP's members in violation of the antitrust laws. The court in *Alden-Rochelle* issued injunctions that went far beyond the boundaries of the consent decree.

Appellant readily admits that the consent decree is of considerable importance to this litigation—but only because it affects the activities of ASCAP. The mere fact that it is court-approved does not make it binding on anyone other than the parties to the decree, which are the United States and ASCAP.

It has been stipulated that no broadcaster, including appellant herein, was a party to the action brought by the United States against ASCAP that terminated in the consent decree (R. 30, Fact 51, p. 10). Nor were any of the defendants, including appellant, consulted by the United States concerning said action and decree (R. 30, Fact 52, p. 10). Obviously, appellant was not consulted by ASCAP or a representative of ASCAP (R. 30, Fact 53, p. 10).

Not even the ASCAP members themselves can intervene in the terms of the consent decree. The *Fox Publishing* case flatly ruled this to be the case when one of ASCAP's disenchanted members attempted to have his say about the terms of the consent decree.

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. In *United States v. Borden Co.*, 347 U.S. 514, 98 L.Ed. 903, 74 S.Ct. 703, it was ruled that it was an abuse of discretion for the District Court to refuse the Government an injunction against certain acts held violative of the antitrust laws, even though the same acts had already been enjoined in a private suit. It was there stated in the clearest terms that 'private and public actions were designed to be cumulative, not mutually exclusive' (*Id.* 347 U.S. at 518), and, quoting from *United States v. Bendix Home Appliances, Inc.* (D.C., N.Y.) 10 F.R.D. 73, 77 '. . . The scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.' [Citation omitted.]
>
> "This principle is certainly broad enough to make it clear that just as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation." [Citations omitted.] *Sam Fox Publishing Co. v. United States*, 366 U.S. at 689, 690.

When the broadcasters requested clearance at the source like that enjoyed by movie exhibitors under the terms of the consent decree in the *Shenandoah* proceedings, Judge Ryan held that since they were not parties to the decree they could not seek to modify it and had nothing to say about it:

> "Petitioners were not parties to the judgment; they have petitioned only as beneficiaries under it and they may not under cover of the protection from discrimination afforded them under its provisions indirectly effect an amendment to that judgment so as to wrest from ASCAP a type of license it is now under no judicial compulsion to grant." *In the Matter of the Application of Shenandoah Valley Broadcasting Inc.* et al., Petitioners, For the Determination of Reasonable License Fees, United States District Court, Southern District of New York, Civil 13-95.

The illegal conduct of ASCAP and its members has gone unheeded since the rulings of Judge Nordbye in the *Witmark* decision. Just as the 1941 decree did not excuse ASCAP's unlawful activities in 1950, the 1950 decree does not excuse such conduct in 1965, nor does it curtail the rights of third persons to challenge the unlawful activities.

> ". . . the antitrust consent decree is not to be viewed solely as a contract resulting from an unrestricted bargaining process between the government and the defendants. Rather, it is an agreement for a voluntary settlement of antitrust issues in which the scope and content of the provisions therein can rise no higher than their source in the legislative objectives and prohibitions of the standards embodied by Congress in its national antitrust policy . . . It follows, therefore, that neither antitrust officials nor a court of equity has authority under law to induce or accept provisions in consent decrees unless they are related to the prevention or correction of violations of the antitrust laws within the congressional objectives of

> that legislation. . . ." Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L.Rev. 1139 at 1230, 1234 (1952).

Price fixing under a consent decree is still price fixing by any other name. Monopolization under a consent decree is still monopolization. Pooling copyrights and sharing fees under a decree are still activities and agreements in restraint of trade. No decree can cut-off or curtail the rights of third parties under Section 4 of the Clayton Act (15 U.S.C.A. §15).

As the *Fox Publishing* case pointed out, private litigants are not bound by the acts of Government to which they are strangers. Nor can the Department of Justice bind the legislature of the State of Washington. Although the present arrangements found in the consent decree may satisfy state and federal law enforcement officials and the trial court, that does not mean they satisfy the laws passed by the Washington State Legislature, or by Congress.

The Justice Department may determine when and how to act to protect the public, but the Justice Department is not infallible by any means—witness the difference in the 1941 decree and the 1950 decree—and the department certainly does not have the power to determine when and how private parties may assert their rights under Section 4 of the Clayton Act.

The Second Circuit recently had the opportunity to pass upon the application of the 1950 consent decree in *United States v. American Society of Composers, Authors and Publishers,* 331 F.2d 117 (2 Cir. 1964). In affirming Judge Ryan's ruling that broadcasters cannot intervene in the consent decree, that does not prevent them from asserting their own rights in private antitrust litigation, such as this case is:

> "If appellants' position in fact has the merit under the antitrust laws which they assert, they have effective remedies available, either by persuading the Department of Justice to apply under Section XVII for a modification of the Judgment, *or by a private suit which our ruling here in no way affects.*" *United States v. American Society of Composers, Authors and Publishers*, at 124. (Emphasis added.)

**The Power of the Court**

More important than damages and attorneys' fees the appellant asks the court to issue injunctions. The specific requests are set forth in the pretrial order as "Defendants' Contentions of Law," No. 8 (R. 30, pp. 29-30), and in Appendix "E" of this brief.

Not only should the court follow the unswerving line of authorities and hold that appellees' activities render their performance rights unenforceable, but the court should compel remedial measures. Confronted with similar copyright misuse, the trial judge in *Alden-Rochelle, Inc. v. ASCAP*, *supra*, issued injunctions prohibiting continued wrongdoing. The court went to the heart of the problem in the second *Alden-Rochelle* opinion dealing with the decree. *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 900 (1948). Quoting from the Supreme Court, Judge Leibell said:

> "'If the alleged combination is shown to exist, the decree which can be entered will be no idle or futile gesture. * * * It will supply an effective remedy without which there can be only an endless effort to rectify the continuous injury inflicted by the unlawful combination. The threatened injury is clear.'" *Alden-Rochelle, Inc. v. ASCAP*, 80 F.Supp. at 903, quoting

*Georgia v. Pennsylvania R.R.*, 324 U.S. at 462.

In *Bigelow v. RKO Radio Pictures*, 162 F.2d 520, at page 524, the Circuit Court of Appeals, Seventh Circuit, said:

> ". . . the decree may very properly be used to destroy the conspiracy root, branch, and all its evil fruits. . . ."

Thus, in *Alden-Rochelle*, Judge Leibell wrote a meaningful decree compelling ASCAP and its members to, among other remedies, license performing rights with motion picture recording rights, and actually prohibited ASCAP and its members from suing theater exhibitors for infringement of performance rights. There is no substantive difference between a musical recording and a motion picture recording, nor is there a substantive difference between a radio station's use of a record and a theater's use of a film. If there are, let the appellees come forth with their brief and show us.[29]

More authority for the courts' power to write far-reaching and effective decrees is cited below:

> "The generality of the standards of the antitrust laws creates a broad range of discretion with respect to the content of provisions incorporated in consent decrees. It is clear that provisions may go beyond the prohibition of conduct previously adjudged by the courts as antitrust violations and embrace relief that may be reasonably anticipated after litigation. As in other equity decrees, a consent decree may enjoin not only the precise transactions or conduct complained against but also activities subject to abuses

29. It is interesting to note that to this day television stations using the same films as moving picture theatres still must have ASCAP license to broadcast the films. Judge Leibell's decision did not include films used on television because television did not become an important factor until after 1948.

similar to those specified in the complaint." OPPENHEIM, FEDERAL ANTITRUST LAWS, p. 1065 (2d Ed. 1959).

* * * *

"'In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law.'" VAN CISE, UNDERSTANDING THE ANTITRUST LAWS, p. 17 (1963).

This court has the power to pry from ASCAP the performance rights of over a million compositions and release them to users on a competitive basis; to reward those composers deserving of reward; and to free valuable music from subsidizing unused, unwanted and mediocre music. This court can and should compel compulsory licensing.

"Compulsory licensing and sale of patented devices are recognized remedies. They would seem particularly appropriate where, as here, a penchant for abuses of patent rights is demonstrated." *Besser Manufacturing Co. v. United States*, 343 U.S. 444, 449 (1952).

The court can even enjoin acts which would otherwise be permissible if it were not for the vast block booking arrangements perpetrated by ASCAP's members. This is the rule of the *Loew's* case in which film companies block booked copyrighted films. In the *Loew's* case the Supreme Court even added more to the injunctions demanded by the trial court.

"Some of the practices which the Government seeks to have enjoined with its requested modifications are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined. (Citations omitted.) When the Government has won the lawsuit, it is entitled to win the cause as well." *United States v. Loew's, Inc.*, 371 U.S. at 53 (1962).

## CONCLUSION

This has been a long and complicated lawsuit involving many facts and many issues. The appellant respectfully beseeches the court to cut away the chaff and go to the heart of the matter. This means the court should apply the established and traditional equitable principles laid down by the courts without deviation since the advent of patents and copyrights in this nation, and reverse the judgment, and grant the injunctive relief, attorneys' fees and costs sought by the appellant.

Respectfully submitted,

RONALD A. MURPHY
*Attorney for Appellant*
K-91, Inc.

## CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD A. MURPHY
*Attorney for Appellant*

# APPENDICES

## APPENDIX "A"

### Facts Stipulated in the Pretrial Order But Omitted from the Findings

(Specification of Error No. 18)

18-1. Although certain defendants did not pay royalties directly to ASCAP or the plaintiffs, they did pay royalties to plaintiffs by paying fees to networks which passed them on to plaintiffs. (R. 30, Agreed Fact 9, p. 3.)

18-2. The ASCAP repertory includes more than a million musical compositions. The exact number constantly changes. (R. 30, Agreed Fact 13, p. 3.)

18-3. ASCAP at all times pertinent, except for a period of time in and around 1959, was and now is engaged in issuing licenses for performances of works in its repertory to broadcasters located in the State of Washington. Such licenses are mailed by ASCAP from New York City, signed by broadcasters in the State of Washington, thence returned and signed by ASCAP in New York City. (R. 30, Agreed Fact 19, p. 5.)

18-4. At all times pertinent hereto, each of the plaintiffs has been paid and received and will continue to be paid and receive royalty compensation and other consideration from ASCAP, some of which money is from broadcasters in the State of Washington. (R. 30, Agreed Fact 20, p. 5.)

18-5. At all times pertinent hereto, broadcasting stations were the only users of music located in the State of Washington from whom ASCAP collected fees. Plaintiffs collected no fees from any other user located in the

State of Washington. (R. 30, Agreed Fact 21, p. 5.)

18-6. ASCAP licenses broadcasting stations on behalf of its members under only two types of licenses, one of which is called "blanket" and the other "per program." (R. 30, Agreed Fact 22, p. 5.)

18-7. The affairs of ASCAP are managed by its Board of Directors, the members of which are elected by the members of ASCAP. The fee to be quoted for any license of the ASCAP repertory is initially determined by the Board of Directors, as distinguished from its members. If a user and ASCAP are unable to agree upon the initial fee or negotiate a fee it may be determined as provided in the Amended Final Judgment of March 14, 1950. (R. 30, Agreed Fact 24, p. 6.)

18-8. The filings (dated July 21, 1961, and August 7, 1962), made by ASCAP with the Secretary of State of the State of Washington, set forth the only forms of licenses which then were and are made available by ASCAP to users in Washington. (R. 30, Agreed Fact 25, p. 6.)

18-9. In the last ten years, neither ASCAP nor any plaintiff has entered into any license agreement with any broadcaster located in the State of Washington on any other basis than the forms referred to in paragraph 23 and similar prior forms. (R. 30, Agreed Fact 26, p. 6.)

18-10. If called, plaintiffs would testify that all plaintiffs have at all times in the last ten years been ready to negotiate with any broadcaster for a license to perform any of plaintiffs' copyrighted musical compositions in the State of Washington on any mutually agreeable basis, including a "per piece rate." If called, defendants and other broadcasters would testify that the defendants did not ask for per piece licenses from the individual plaintiffs, because to do so would have been a useless and futile act. (R. 30, Agreed Fact 27, p. 16.)

18-11. At all times here pertinent, plaintiffs have received royalties for the publication of their copyrighted musical compositions which are usually paid according to the number of sales of individual sheet music or records. In addition to any royalties so received, plaintiffs also received for the public performance for profit of their copyrighted musical compositions royalties which are paid in accordance with the ASCAP Articles of Association and Membership Agreement as amended by and according to the provisions of the 1950 and 1960 decrees. (R. 30, Agreed Fact 29, p. 7.)

18-12. ASCAP offers licenses in Washington to users of music where fees are charged for performance of specific compositions. (R. 30, Agreed Fact 43, p. 9.)

18-13. Such licenses are not offered to broadcasting stations located in Washington. (R. 30, Agreed Fact 44, p. 9.)

18-14. Music is a necessity to the broadcasting industry in the State of Washington and throughout the United States. (R. 30, Agreed Fact 45, p. 9.)

18-15. The income of any composer, author or publisher of popular music depends primarily on the public performance of such music by broadcasting stations. (R. 30, Agreed Fact 46, p. 9.)

18-16. Very few commercial radio broadcast stations can exist today without access to commercial use of copyrighted music. (R. 30, Agreed Fact 47, p. 9.)

18-17. Three music licensing organizations in the United States license the non-dramatic performing rights of substantially all of the copyrighted musical works in the United States today. ASCAP is one of these organizations and more than 50% of all performances of copyrighted music by broadcasting stations in the United States are licensed by ASCAP and are performances of compositions in which the copyrights are held by members of ASCAP. More than 87% of ASCAP's total revenue is derived from license fees paid by broadcasting stations and networks, and less than 13% from all other uses of music combined. In the State of Washington 100% of ASCAP's collections comes from broadcasters. (R. 30, Agreed Fact 48, p. 9.)

18-18. ASCAP's total revenue in 1962 was $34,841,-010.94. Revenue from radio and television stations and networks was $30,557,084.30 in 1962, and revenue from all other licenses was $4,283,926.62. (R. 30, Agreed Fact 49, p. 9.)

18-19. No broadcaster, including defendants herein, was a party to the anti-trust action brought by the United States of America, entitled "*United States of America v. American Society of Composers, Authors and Publishers,*" Civil Action No. 13-95 (United States District Court for the Southern District of New York). (R. 30, Agreed Fact 50, pp. 9-10.)

18-20. None of the defendants herein, including defendant Rogan Jones, was a party to the action entitled "*United States of America v. American Society of Composers, Authors and Publishers,*" Civil Action No. 13-95 (United States District Court for the Southern District of New York), in which the Amended Final Judgment was entered on March 14, 1950. (R. 30, Agreed Fact 51, p. 10.)

18-21. Defendant was not consulted by an agent of the United States concerning said legal proceedings prior or subsequent to the said Amended Final Judgment. (R. 30, Agreed Fact 52, p. 10.)

18-22. Defendant was not consulted by an agent or representative of ASCAP concerning said legal proceedings prior to said Amended Final Judgment. (R. 30, Agreed Fact 53, p. 10.)

18-23. Some of plaintiffs, and other members of ASCAP, are subsidiaries of or otherwise affiliated with various record companies. (R. 30, Agreed Fact 54, p. 10.)

18-24. It would be commercially, practicably and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations. It would be commercially, practicably and virtually impossible for plaintiffs and other composers, authors and publishers to issue a separate license for each performance broadcast over broadcasting stations or to have the payment for such performances on the basis of each individual use. (R. 30, Agreed Fact 50, pp. 10-11.)

18-25. There are approximately 5,469 stations licensed by the FCC and broadcasting in the United States today, the overwhelming majority being commercial broadcasters, with comparatively very few educational broadcasting stations. (R. 30, Agreed Fact 54, p. 11.)

18-26. Movie producers do not acquire the performance rights or any other rights from ASCAP. Performance for profit rights are generally acquired by networks for their affiliated stations and by background music users for their subscribers, and by movie producers for their movie exhibitors. (R. 30, Agreed Fact 59, p. 11.)

18-27. There are in existence virtually no licenses for the performance rights to music in ASCAP's repertory between individual broadcasters and plaintiffs and other members of ASCAP in which the broadcaster agrees to pay for such performance rights. (R. 30, Agreed Fact 60, p. 11.)

18-28. Each musical copyright is unique (R. 30, Agreed Fact 61, p. 11.)

18-29. ASCAP makes per program licenses available to all broadcasters; fewer than 60 to 100 broadcasters in the United States elect that form of agreement. At the time of the alleged infringement and now, none elect that form in Washington. (R. 30, Agreed Fact 62, p. 11.)

18-35. At the time of the alleged infringement and now, there were and are no licenses in effect between any plaintiff, or to the knowledge of these plaintiffs any other ASCAP member, and any recording company authorizing any broadcasting station to perform publicly for profit any musical composition. (R. 30, Agreed Fact 63, p. 11.)

18-36. Plaintiffs do not permit any other music licensing organization such as Broadcast Music Inc., or SESAC, Inc., to license the performance of the compositions alleged infringed. (R. 30, Agreed Fact 67, p. 12.)

18-37. Plaintiffs do not permit any other such licensing organizations to license the performance of any of plaintiffs' musical compositions. (R. 30, Agreed Fact 68, p. 12.)

18-38. None of the plaintiffs has ever entered into any blanket license with any user in the State of Washington relating to plaintiffs' musical compositions other than through ASCAP and by ASCAP licenses; to defendants' knowledge plaintiffs have received no request from any broadcaster in the State of Washington other than those made through ASCAP for a blanket license relating to plaintiffs' musical compositions. (R. 30, Agreed Fact 69, p. 12.)

18-39. Composers and publishers actively compete to have their music recorded by recording companies and played by broadcasting stations. (R. 30, Agreed Fact 53, p. 12.)

18-40. In 1959 ASCAP refused to offer licenses to any broadcasters located in the State of Washington. Thereafter, on November 20, 1959, the owners of many stations in the state petitioned the United States District Court for the Southern District of New York to issue an order directing ASCAP to issue licenses. (R. 30, Agreed Fact 73, p. 13.)

18-41. On November 20, 1959, the said court issued an agreed order directing ASCAP to issue licenses to the petitioners. Such order (see Exhibit 1 annexed hereto) was issued upon stipulation and agreement of the parties. (R. 30, Agreed Fact 74, p. 13.)

18-42. Defendant and the other broadcasting stations cannot obtain licenses to broadcast any of the compositions contained in ASCAP's repertory except from ASCAP or from each individual member of ASCAP or any other person who has obtained the necessary rights from ASCAP or from the members in interest. (R. 30, Agreed Fact 79, p. 14.)

18-43. Defendant and the other broadcasting stations cannot obtain licenses to broadcast any of the compositions, the performance rights to which are held by plaintiffs, from anyone other than ASCAP or plaintiffs or from each individual member of ASCAP or any other person who has obtained the necessary rights from ASCAP or from the members in interest. (R. 30, Agreed Fact 80, p. 14.)

18-44. Some stations, including some located in Washington, desire certain special styles or kinds of music programming, such as western, religious, "good music," classical and "top 40." (R. 30, Agreed Fact 81, p. 14.)

18-45. ASCAP does not offer licenses to broadcasters for special catalogues of music such as western, religious, "good music," classical, "top 40." (R. 30, Agreed Fact 82, p. 14.)

18-46. The performance rights to some music in ASCAP's repertory is vastly more valuable than the performance rights to other music in ASCAP's repertory, and of all the millions of musical compositions copyrighted very few become hits or of any significant value. This is also true of the performance rights to music written by the plaintiffs. (R. 30, Agreed Fact 83, p. 14.)

18-47. The revenue distributed by ASCAP, pursuant to the consent decree, to its members from performance rights fees cannot be segregated to determine how much money is distributed for any particular composition. (R. 30, Agreed Fact 84, p. 14.)

18-48. ASCAP distributions, pursuant to the consent decree, cannot be allocated to a particular state or area or to a particular composition. (R. 30, Agreed Fact 84, p. 14.)

18-49. SESAC and BMI license users other than broadcasters in the State of Washington. (R. 30, Agreed Fact 86, p. 14.)

18-50. Under the terms of the application for membership and a member's contract with ASCAP, all of his or its compositions listed in the application for membership or written, composed or published during the term of his or its membership, become part of the ASCAP repertory. (R. 30, Agreed Fact 87, p. 14.)

# APPENDIX "B"

## Facts Admitted in the Pretrial Order But Omitted from the Findings

(Specification of Error No. 19)

19-1. At all times herein pertinent, certain defendants paid sums to networks which networks paid fees to ASCAP for network licenses for network (but not local) programs. (R. No. 1, p. 1.)

19-2. Said fees were ultimately distributed to the plaintiffs. (R. No. 2.)

19-3. Immediately after defendant Wescoast Broadcasting Co., Inc., refused to enter into agreements on the same terms as had been entered into with other defendants, Wescoast was sued for an additional twenty-eight infringements on which statutory damages would be not less than $7,000 and not more than $140,000, plus costs and reasonable attorneys' fees in such amount as the court deems proper. (R. No. 26, p. 6.)

19-4. Each of the plaintiffs and the other members of ASCAP share in the royalties and fees for performance of music composed, published and owned by other members of ASCAP. (R. No. 29, p. 7.)

19-5. Some of the plaintiffs had no knowledge of the alleged infringements or that any action was being filed. (R. No. 30, p. 7.)

19-6. Not all phonograph records are marked as to the name of the licensing organizations that license the music contained on the record. (R. No. 32, p. 8.)

19-7. Some of the ASCAP's members, including some of the plaintiffs herein, have received thousands of dollars from advertising agencies or other commercial users for the right to use one musical composition as a radio or television commercial. (R. No. 34, p. 8.)

19-8. One advertising agency paid almost $100,000 for the right to use one song published by one of the plaintiffs as a radio or television commercial. (R. No. 36, p. 8.)

## APPENDIX "C"

### Defendants' Contentions of Fact

(Specification of Error No. 20)

20-1. The plaintiffs, ASCAP, and the other members of ASCAP, at all times pertinent hereto:

(a) Are two or more persons holding or claiming separate copyrighted works, under the copyright laws of the United States, and

(b) Have banded together and pooled their interests for the purpose of fixing prices on the use of said copyrighted works, and

(c) Have pooled their separate interests and conspired, federated and joined together for the purpose of collecting fees in this state, and

(d) Have issued blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works, and

(e) Have not issued licenses to broadcasters or defendants on rates assessed on a per piece system of usage.

20-2. ASCAP licenses broadcasting stations on behalf of its members under only two types of licenses, one of which is called "Blanket" and the other "Per Program." Both the per program license and the blanket license are blanket licenses, that is, the user has the right to use everything in the repertory without getting any special permission. ASCAP does not offer broadcasters any other kind of license.

20-3. At all times pertinent hereto, neither ASCAP nor any of the plaintiffs has ever offered licenses to broadcasting stations in the State of Washington where fees are charged according to the number of performances broadcast, i.e., on a basis of so much money per performance for profit.

20-4. ASCAP does not now offer to broadcasting stations licenses based upon a per piece rate as described in RCW 19.24, *et seq*.

20-5. Plaintiffs individually do not now offer such licenses.

20-6. Plaintiffs individually did not offer such licenses at the time of the alleged infringement.

20-7. Neither ASCAP nor plaintiffs has ever issued such a license to broadcasting stations in the State of Washington, and no such licenses are in use in Washington.

20-8. The fees provided for in ASCAP's blanket and per program licenses offered broadcasting stations in Washington have no relation to the amount of ASCAP's music that is played on a broadcasting station.

20-9. The filings (dated July 21, 1961, and August 7, 1962) made by ASCAP with the Secretary of State of the State of Washington do not include any licenses for broadcasting stations based upon a per piece system of usage, and list the only licenses available to them as blanket type licenses.

20-11. None of the plaintiffs has ever filed a copy of any per piece license for use by broadcasting stations as described in RCW 19.24, *et seq.*, with the Secretary of State.

20-12. The ASCAP membership contract contains the following terms which have not been modified by the consent decree:

(a) "The Society agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the *Owner*, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

(b) "The *Owner* hereby irrevocably, during the term hereof, authorizes, empowers and vests in the *Society* the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the *Owner* and/or others, in any and all works copyrighted by the *Owner*, and/or by others, to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the *Owner* and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the *Owner* and/or in the name of the *Society*, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the *Owner* might or could do, had this instrument not been made.

(c) "The *Owner* hereby makes, constitutes and appoints the *Society*, or its successor, the *Owner's* true and *lawful attorney*, irrevocably during the term hereof, and in the name of the *Society* or its successor, or in the name of the *Owner*, or otherwise to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises." (Agreement, *ibid.*)

20-13. ASCAP has authority to settle these actions.

20-14. ASCAP, through its agents and legal representatives, has at all times pertinent hereto *threatened* broadcasting stations, including defendant, with suits for infringement of copyrighted musical compositions claimed by its members unless such stations sign one of the two types of blanket licenses.

20-15. ASCAP, through its agents and representatives, continues to make such *threats*.

20-16. ASCAP *threatens* to see that more suits for alleged infringements of copyrighted musical composition claimed by its members are filed against defendant and other broadcasting stations in Washington

20-17. Several broadcasting station defendants have recently negotiated *settlements* of their suits. Immediately thereafter, plaintiffs herein and ASCAP threatened to sue other stations unless they also settled.

20-18. Immediately after defendant *Wescoast Broadcasting Co., Inc.*, refused to settle on the same terms as several other defendants had, Wescoast was sued for an additional twenty-eight infringements, amounting to $7,000.00 plus costs and attorneys' fees.

20-19. Several small radio stations recently sued by ASCAP have had to settle by signing ASCAP blanket licenses and pay the fees required thereunder because of the tremendous *costs of litigation* and threats of further prosecution.

20-20. Each of the plaintiffs, together with ASCAP, realized the hardship and costs of litigation and relies upon this fact as a means to *intimidate* and *coerce* stations into signing blanket licenses.

20-21. Each of the plaintiffs, with ASCAP, sued the defendant and other defendants in a *concerted campaign* to force defendant to sign a blanket-type license.

24-22. At all times pertinent, each of the plaintiffs and ASCAP has:

(a) Attemped to use the federal courts as innocent instrumentalities in the furtherance of a systematic campaign and scheme designed to illegally fix prices for the commercial use of copyrighted works in Washington, and

(b) Used extortionate means and terrorizing practices based on threats of suits, and

(c) Abused both state and federal process.

20-23. The only licenses offered by ASCAP to radio and television stations in the State of Washington require that defendant subscribe to all of the music in ASCAP's repertory, including the music of many composers and publishers not a party to this action, whether defendants desire the right to play that music or not and regardless of whether defendants have played the music or ever will play it.

20-24. So long as he remains a member, the member may not assign or license the performance rights to *recording* companies.

26-25. ASCAP is the only one who can license *recording* companies.

20-26. No one has asked for licenses for *recording* companies authorizing broadcasting stations to perform musical compositions publicly for profit, because to do so would have been *useless* and futile.

20-27. Broadcasters in the State of Washington have not asked individual plaintiffs for licenses, because to do so would have been *useless* and *futile.*

20-28. The plaintiffs, together, and with ASCAP and the other members of ASCAP, at all times pertinent, and now:

(a) Engage in and are parties to a combination, conspiracy and contracts, agreements and understandings among themselves in unreasonable restraint of interstate trade and commerce in music performance rights;

(b) Fix, stabilize, regulate and affect the *price* of music and performance rights thereto, and establish and maintain uniform and non-competitive prices for such rights;

(c) Prohibit broadcasters from obtaining performance rights to music on records with the purchase or other acquisition of records, i.e., *clearance at the source;*

(d) *Pool* performance rights to music among themselves:

(e) *Share* in the royalties and fees for performance of music composed, published and owned by other members of ASCAP;

(f) Violate the provisions of the amended *consent judgment* entered in the United States District Court referred to above, by preventing them from having a *genuine economic* and competitive choice between ASCAP and individual member licenses and between blanket and per program licenses;

(g) Coerce and compel defendant and other broadcasters, in order to continue in business, to acquire from ASCAP one of two types of blanket licenses for the performance rights to all the copyrighted musical compositions in the ASCAP repertory, whether defendants and other broadcasters have need for or actually use the same or not;

(h) Coerce broadcasters to accept *blind selling* practices;

(i) *Condition* the *license* of the rights of performance for profit of usable or desirable music on the license of their entire repertory which contains unwanted, unusable and undesirable music;

(j) Make the so-called right to deal with individual members of ASCAP, *illusory* because of the thousands of ASCAP members, the hundreds of thousands of compositions involved, the rapidity at which music is composed, published and popularized, the immediacies of everyday broadcasting, and the charges demanded;

(k) *Restrain competition among themselves* in the performance rights market place and stifle the ability of non-members to market their music by practices of pooling rights, price fixing, block booking, sharing fees and dealing almost exclusively through ASCAP.

(l) Restrict incentive for *young* and/or *new* composers or writers;

(m) *Tie* the sale and purchase of poor music to good music and thereby artificially equalize the reward to members and prevent remuneration from being related to quality;

(n) *Discriminate against broadcasters* who must compete with other users of music such as motion picture theaters, recreation centers, symphonies and background music disseminators by failure to license them, failure to enforce copyrights, charging disproportionate fees and granting them clearance at the source.

(o) *Stifle* the flow of music to the *public* and the incentive of would-be composers and authors to create new music for the enlightenment and enjoyment of the public.

20-29. A substantial portion of the license fees for performance rights licensed to broadcasters represents the *cost of unused music.*

20-30. All defendants have at all times here pertinent been *ready to negotiate* and pay fees for the performance of plaintiffs' or other copyright holders' copyrighted works where the right to perform has been previously acquired at the *source* as is the practice with networks, jingles and transcribed programs.

20-31. All defendants have at all times pertinent been ready to *negotiate* and pay fees for the right to perform copyrighted works on *records* where such right has been cleared for performance by broadcasting stations.

20-32. All defendants have at all times here pertinent been ready to *negotiate* and pay fees for the right to perform copyrighted music when fees are charged on the basis of so much money per time a *piece* of music is played.

20-33. Broadcasting stations *compete* with other broadcasting stations and other *entertainment businesses* such as nightclubs, restaurants, theaters, bowling alleys, symphonis and motion picture theaters for the public's time and attention.

20-34. Performance rights for music on *motion picture* films, some jingles, transcribed programs and television programs are *negotiated on an individual basis.*

20-35. Some stations, including the defendants herein, do not desire to broadcast all types, kinds or *styles of music* available.

20-36. It would be impossible for the defendants to operate their radio stations without music licensed by ASCAP.

20-37. The dissemination and commercial use of music when performed publicly and broadcast by radio and television stations is a business affected with the *public interest.* Music is a commodity of general business necessity and use throughout the United States.

20-38. Broadcast stations supply a necessity and their business affects the public interest.

20-39. Radio stations affiliated with networks, other than those originating networks broadcasting, have no *control over the selection* of the musical compositions which are performed on the network and received by the affiliate.

20-40. Broadcasting is the principal medium through which individual musical compositions are transmitted to the ear of the public.

20-41. Blanket licenses destroy the *incentive* of broadcasting stations and individual composers and authors to bargain among themselves for performance rights and destroy the incentive of broadcasters to perform the music of composers and authors not members of the blanket licensing organization.

20-42. The "Blanket" and "Per Program" licenses offered by ASCAP both require payment charged upon income received by broadcasters for time devoted to the broadcasting of matters such as *news, lectures, discussion,* public events and sporting events, which employ none of the copyrighted music of the plaintiffs or members of ASCAP, or any music whatsoever.

20-43. The *Federal Communication Commission* requires broadcasters to devote time to public events, public issues and service, sporting events, discussion and matters of current community interest which do not normally employ the use of music.

## APPENDIX "D"

### Specific Violations of the Federal Antitrust Laws Contended by Appellant in the Pretrial Order

(Specification of Error No. 42)

42-1. Unlawfully extending the copyright laws.

42-2. Acquiring a monopoly on the separate monopolies granted by the United States copyright laws in derogation of such laws and the anti-trust laws.

43-3. Combining, conspiring and agreeing to restrain trade or commerce in music, including the performance rights of music, among the several states.

42-4. Pooling copyrights and fixing prices therefore, and claiming rights under and entering into contracts, agreements and undestandings among themselves, with ASCAP and the other members of ASCAP, other persons and organizations having or controlling music and rights connected therewith, which restrict the use of music and rights connected therewith.

42-5. Refusing to issue to defendants and other broadcasters licenses based at a fee or rate which is assessed on actual use or number of performances or licenses for special catalogues of music such as western, religious, concert, as distinguished from existing blanket type licenses.

42-6. Conditioning the license of performance for profits rights of useable or desirable music on the license of their entire repertory which contains unwanted, unuseable and undesirable music.

42-7. Discriminating against defendants and other commercial users of music as to types of licenses offered, prices charged, methods of collection, and means of enforcement.

42-8. Issuing blanket licenses in the State of Washington which violate said state's laws.

42-9. Prohibiting broadcasters from obtaining performance rights to music on records with the purchase or other acquisition of the records.

42-10. Refusing in concert with other music copyright owners to issue music performance licenses which exclude pre-recorded material which has been cleared at the source for public performance.

## APPENDIX "E"

### Specific Injunctive Measures Sought by Appellant in the Pretrial Order

(Specification of Error No. 43)

43-1. Combining or conspiring or agreeing to restrain trade or commerce in music, including the performance rights of music, among the several states.

43-2. Claiming any rights under or entering into any contract, agreement or understanding among themselves, with ASCAP or the other members of ASCAP or other persons or organizations having or controlling music or rights connected therewith which restrict the use of music or rights connected therewith.

43-3. Refusing to issue to defendants or other broadcasters licenses of specialty catalogues or licenses based on a system of usage at a fee or rate which is assessed on actual use or number of performances and as distinguished from existing blanket license rates based on music never used, and which fee or rate is economically fair, practical and reasonable.

43-4. Block booking.

43-5. Discriminating among defendants and other commercial users of music as to types of licenses offered, prices charged, methods of collection, and means of enforcement.

43-6. Issuing blanket licenses in the State of Washington which violate said state's laws.

43-7. Suing for infringment of plaintiffs' copyrighted works until such time as plaintiffs comply with all provisions the court may order, adjudge and decree, and until such times as plaintiffs comply in all respects with the laws of the State of Washington, the Federal anti-trust laws and the Federal copyright laws.

43-8. Prohibiting record companies from obtaining performance rights so as to enable broadcasters to perform music on recordings without obtaining a separate performance rights license.

43-9. Refusing in concert with other music copyright holders to issue music performance licenses which exclude pre-recorded material which has been cleared at the source for public performance.

## APPENDIX "F"

### Statutes Involved

*The Copyright Law*

Section 1 of the Copyright Law, 17 U.S.C. Sec. 1 provides in pertinent part:

> "Sec. 1. Exclusive rights as to copyrighted works
>
> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: * * *
>
> * * *
>
> "(e) To perform copyrighted work publicly for profit if it be a musical composition; . . ."

Section 101 of the Copyright Law, 17 U.S.C. Sec. 101, provides in pertinent part:

> "Sec. 101. Infringement
>
> "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> "(a) Injunction.—To an injunction restraining such infringement;
>
> "b" Damages and profits; amount; other remedies. —To pay to the copyright proprietor such damages as the copyright proprietor may have offered due to the infringement, * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, * * * and such damages shall in no . . . case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty."

Section 116 of the Copyright Law, 17 U.S.C. Sec. 116, provides:

Sec. 116. Costs, attorney's fees

> "In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the cost."

*The Sherman Act*

Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2 of the Sherman Act, 15 U.S.C. Sec. 2, provides in pertinent part:

> "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor."

Section 3 of the Clayton Act, 15 U.S.C. 14 provides, in pertinent part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise,

machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 4 of the Clayton Act, 15 U.S.C. 15, provides, in pertinent part:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."

Section 16 of the Clayton Act, 15 U.S.C. Sec. 26, provides, in pertinent part:

"Any person, firm, corporation, or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss of damage by a violation of the antitrust laws, including Sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate. . ."

**Washington Statutes**

RCW 19.24.020, provides, in pertinent part:

"It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate or join together for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighter works: *Provided, however,* such persons may join together if they issue licenses on rates assesed on a per piece system of usage: *Provided, further,* This act shall not apply to any one individual author or composer holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any groups or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher or more inequitable rates per piece for music licenses in this state than in other states. . . ."

RCW 19.24.040, provides, in pertinent part:

'In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise. a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the State of Washington, together with a list of the prices charged or demand for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the office of the state Treasurer at Olympia."

RCW 19.24.050, provides, in pertinent part:

'The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once a year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws."

RCW 19.24.055 provides, in pertinent part:

"No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this chapter, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program; *Provided, however*, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or associations of persons, as prohibited by this chapter, need not file any such list."

RCW 19.24.060 provides, in pertinent part:

"It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a big business clothed and affected with the public interest and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of Federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with the copyright laws of the United States. The provisions of this act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the Federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and Federal process, all of which are declared to be in violation of this act and of the state constitution, and it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner; *Provided, further,* The legal situs of any copyrighted work is coextensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington."

(The balance of RCW 19.24.060 is also pertinent to this case. It is recited in full in Appendix "A" which is attached hereto. Paraphrasing it makes the "production," "creation" and "commercial use of music" in this state a business "clothed and affected with the public interest" and of "public necessity.")

RCW 19.24.100 provides, in pertinent part:

> ". . . and all licenses of any violator of this chapter shall be deemed as aiders and abettors of said persons and subject to the provisions of this chapter unless they forthwith indicate their obedience herewith. . . ."

RCW 19.24.290 provides, in pertinent part:

> "Every person, in addition to the other penalties provided in this chapter, who violates or who procures, or aids or abets in the violating of any provision of this chapter, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this chapter, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this chapter, or to render ineffctual any valid order of any court in connection with the enforcement of this chapter shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months (6), or both such fine and imprisonment."

*The Washington Constitution*

Article XII, Sec. 22, of the Constitution of the State of Washington, provides:

> "Sec. 22. Monopolies and Trusts. Monopolies and trusts shall never be allowed in this state, and no incorporated company, co-partnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees or assignees of such stockholders, or with any co-partnership or association of persons, or in any manner

whatever for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise."

## APPENDIX "G"

**Testimony of Rogan Jones, President of International Good Music, Inc., and Wescoast Broadcasting Co., Owners of KGMI, Bellingham, Washington, and KPQ, Wenatchee, Washington, respectively.**

"The Witness: No, I am not trying to get ASCAP's music for nothing. I think it might be cleared at the source as it is for movies.

"There are two basic viewpoints in our position.

"One is that the juke box people get their music for nothing and theaters get their music for nothing. The record people get their music for a limited amount.

"We add greatly to the value of all the music that we play, which is the reason we get records for nothing and for a discount price. We think that we should have credit for this.

"And the other point is that we think that in the land of free enterprise we should have the right to bargain for the price we pay for these."

"The Court: In other words, what really disturbs you is the fact that the juke box operators, by statute, are in a preferred position?

"The Witness: Well, the theater people are, too.

"The Court: The theater people, don't they pay for their music when they buy the film?

The Witness: We think we do when we buy a record.

The Court: You mean the two cents?

"The Witness: Yes.

"The Court: And most of the records you get for free?

"The Witness: Well, no, we get these records, Your Honor, because of what we add to the value of the record and the music that we play. This is the thing that is overlooked. We add to the value of the music we play.

"THE COURT: In other words, by playing music you encourage people to buy records?

"THE WITNESS: Correct, sir, and we thereby add to the value of the copyright holder.

"Q. (By MR. TOPKIS): Mr. Jones, in the bargaining that you indulge in with these composers, authors, publishers, which way would you contemplate payment would go? Should you pay them or should they pay you in this land of free enterprise?

"A. I am not sure whether some of them would not be called to pay us. This is why we had payola."

## APPENDIX "H"

**Testimony of Lincoln W. Miller, Assistant President, Queen City Broadcasting Company, owner of KIRO and KIRO-TV, Seattle, Washington.**

"Q. (By Mr. Murphy): Would it be commercially possible for a radio station to negotiate with ASCAP as distinguished from its members for specific compositions?

"A. For the right to use?

"Q. For the right of use—specific—

"A. Individual compositions?

"Q. Right.

"A. I would certainly think not because, there again, ASCAP is located clear to the other end of the country, and for each tune we might be interested in we would have to make a separate trip, goodness knows how many days talking, and we still might not get it because the price might not be right.

"Q. If you had a price list that was determined and you could see, could you then?

"A. That could certainly expedite matters, yes.

"The Court: How would your position be improved if you negotiated on a per piece basis? As I understand it, you play music eight hours out of twelve hours a day. What difference does it make whether you play Irving Berlin or Cole Porter during that period? You would have to pay for what you are playing, wouldn't you?

"The Witness: Under the present arrangement, certainly, we pay for it on a blanket basis which is simply a percentage of the gross income we take in.

"The Court: Suppose you were paying on a per piece basis. How would that improve your situation?

"The Witness: It could improve it substantially from the monetary standpoint because we would then have a different price on these different pieces.

"THE COURT: So you can take out cheaper pieces?

"THE WITNESS: Right, but some of the cheaper pieces might be better for a balanced program, and we might add to it, Your Honor.

"We try to adjust what we call the sound because it is different from other stations so we might want to play all western or all religious, so in the case of our station we try to balance with a little bit of everything, but if we knew what the price tags were, this could well influence the kind of music we play and balance with the kind of music we play. It would certainly influence our decision because the economics would be right in front of us. We would be free to determine.

"MR. MURPHY: No further questions.

**Testimony of James W. Wallace, General Manager, Wescoast Broadcasting Company, Owner of KPQ, Wenatchee, Washington.**

"Q. (By MR. MURPHY): Mr. Wallace, would it be expensive or (Page 210) inexpensive, or what would be the effect if you had a list of all music available and the price for each one of those pieces of music? Could you allocate a price to music and then pick and choose?

"MR. TOPKIS: Objection.

"THE COURT: I am going to let him answer, but I doubt whether he would be qualified to answer the question. There are many different ramifications in a plan of that kind, but I will be glad to hear what you have to say, Mr. Wallace.

"THE WITNESS: I started out as an engineer. I keep index cards. I know exactly what music we play. We have a list of it.

"As to how I arrive at knowing what the music should be, I should give you a background. I have gone through all the offices, President of the Chamber of Commerce, United Good Neighbors, Boy Scouts of America (holder of the Silver Beaver award); I am active in Rotary, Chamber of Commerce, and these things are all necessary for a small town radio station man to know what the people want.

"For one thing, almost sixty percent of our income comes from sources other than music. 44 percent is based on the F.C.C. license for that work, and I can do it on any day or month that might be desired, but still we are obligated under any contract offered us by ASCAP to pay on the total (Page 211) amount and not on that portion of the music we need.

"To answer the question directly, with a list which I have I can insert prices on it very readily if they are available, and I would know exactly what our music cost per day or per month or what would be due ASCAP, and it would not be burdensome.

**Testimony of Lee Facto, Vice President, International Good Music, Owner of KGMI, Bellingham, Washington.**

"The Witness: May I have the question, please?

"The Court: He said is that a feasible way of doing business to deal with the composer on a per piece basis?

"The Witness: Yes, I believe it is.

"The Court: Have you done it recently?

"The Witness: No, sir, because at the present time I do not believe at the present time it is practical, but that is not to say that it would not be practical.

"Mr. Ronald Murphy: Would you explain this to the court in your own words.

"Mr. Topkis: I object to that.

"Mr. Ronald Murphy: In your own words.

"The Witness: Well, I think it is a matter of methodology only, not principle. For example, the present method of doing business with respect to copyrights came into being a long time ago. Since that time there has been a great amount of progress in all fields.

"We feel it would be very, very feasible to operate on a per piece basis if we had access to the information as to who owns the copyright.

"Mr. Topkis: I thought he wanted to deal with the individual composer.

"The Court: Just a minute. You will have the right to cross-examine.

"Q. (By Mr. Ronald Murphy): What about price? Go ahead.

"A. As I say, I do feel that it would be practical to deal indiviually with the composer or through a group such as ASCAP on an individual, per play basis, and I think this could well be very advantageous to all concerned, particularly to a radio station inasmuch as this would allow them to bargain for the price of the music as they do in anything else they buy."

(Page 267 and lines 1-13, page 268, omitted. Commencing with line 14, page 268):

"The Witness: Well, I feel that, first of all, you need information as to who owns a particular piece of music, and, secondly, information as to how much you would have to pay to use the selection on a one-time basis or on a three-time basis or on a five-time or whatever the rate happened to be.

"Beyond this, once you have this information, I believe most stations keep fairly good track of the music they play. They know exactly how many times they play it. If they knew exactly how much it was going to cost them to play it each time, they could actually write the individual composer a check without authorizing an agreed procedure (p. 269) between the composer and the station and any group of representing associates.

"THE COURT: Would you also take into consideration the time in which the piece was played, whether it was at midnight or six o'clock in the evening or eight o'clock in the morning?

"THE WITNESS: Well, if you had that on an individual per piece basis, I think not, Your Honor.

"THE COURT: You think it does not make any difference and the listening public would not have anything to do with how much you would pay?

"THE WITNESS: No, frankly, I think there are a great number of things which make up this product which a radio station sells. Music is one of them. There are news as has been in the testimony here; there is talk about that music; there is personality; there are all these other things. Now, it turns out that music is the only thing which a radio station is not allowed to bargain for as a practical matter under the present methodology. This is what I propose or I am saying. I think there is a practical way to do this to the benefit of everyone.

Lee Facto continued at line 7, page 284:

"Q. What kind of circumstances are those?

"MR. TOPKIS: If Your Honor please, I press my objection to his lack of qualifications.

"THE COURT: You have already covered this in your direct. You cannot go back on that now. You have covered this.

"MR. RONALD MURPHY: Well, if the court please, I think there may be some confusion. I think he should be able to explain what those circumstances are. He should be able to make it clear on the record what he means.

"THE COURT: Proceed. What are those circumstances?

THE WITNESS: The circumstances are where the information as to the copyright held and the price to be charged for the music is readily available on the record, on a list in a catalogue of some sort so that at the point of receiving the record we could determine for this particular record and for this amount of money do we want to play this record, and if we decided at that time that the record was worth the amount of money being asked, we would pay it. If we determined that it wasn't we would not play the record.

MR. RONALD MURPHY: No further questions.

**Testimony of Rogan Jones, President, International Good Music, Inc., owner of KGMI, Bellingham, Washington and KPK, Wenatchee, Washington.**

"Q. (By Mr. Murphy) If you had a list of music, and that music had by it a cost of each individual piece of music, can you operate your radio station by referring to that list of music and paying a certain price for it?

"MR. TOPKIS: Is that a question at the end?

"MR. MURPHY: Yes.

"THE WITNESS: Yes.

"MR. TOPKIS: I object to it.

"THE COURT: Objection overruled.

"THE WITNESS: We could do this very simply, very economically and very practically.

"Q. (By Mr. Ronald Murphy) Would you explain this to the court how it could be done?

"A. The music is picked in our case from these tapes, but if we were going to live records there would be no trouble in picking the music the day before and then running down the prices that evening, and if a price was too big, we could lay that one aside and put on another piece with a price lower. (page 303)

"THE COURT: What would you regard as a price too big?

"THE WITNESS: Well the—on the basis of the present ASCAP contract, the price that we would have to pay would be approximately five cents per selection. This is on the basis of 2 plus per cent and the approximate number of records that we play per day.

"THE COURT: Then you think that five cents would be too much?

"THE WITNESS: No, I think five cents might not be an unreasonable price, but as a free enterpriser I think I ought to have a chance to bargain.

"THE COURT: Then what you object to is Judge Ryan's stipulation that ASCAP is required to charge the same rate to you as it does to a little station?

"THE WITNESS: Yes.

"THE COURT: You think you are entitled to a little advantage because you are bigger?

"THE WITNESS: No, sir. May I illustrate, sir?

"THE COURT: Yes.

"THE WITNESS: There are two automated stations in Bellingham. One does about $1,800 a month in gross business. We supply him his music on tapes, and it is substantially the same music that we use on our own station except that ours is announced and his is unannounced, and we gross about twelve to fifteen thousand dollars a month, and we spend over and (p. 305) above what it costs for the music. We spend a great deal of money on good announcing, on good sports, on good news, on many things.

"But music is one of the very basic costs of operating a good radio station. There are many, many thousands of dollars that go into other things not connected with music, and we think we ought not to have to pay a percentage of our gross in competition with this other boy that does not spend anything. We think this is severe competition.

"THE COURT: You charge more advertising rates than other people?

"THE WITNESS: Yes, sir, but we spend it back. We spend it in many, many ways, sir. Our newsman, our newsman gets about $800 a month. We could hire one for $350, but he would not do as good a job. I am talking about the local newsman, sir.

"We have a farm show where the farm editor gets paid specially and doesn't run any music, but ASCAP wants a percentage of this gross income.

"I would say that our music cost to put on music on our station probably represents ten per cent of our over-all expenses, and the other ninety per cent has nothing to do with music.

"THE COURT: Do you select the compositions? (p. 305)

"THE WITNESS: No, sir, I do not. I can't even play on the floor very well.

"THE COURT: Proceed. Is there any other question of Mr. Jones?

"Q. (By Mr. Ronald Murphy) Does your station also broadcast certain material which has been, the music in connection with it, which has been, as the term has been bandied about here, cleared for performance, the music has been cleared?

"MR. TOPKIS: Your Honor—

"THE COURT: Objection overruled.

"MR. TOPKIS: You are saving me wear and tear on my vocal cords, Your Honor.

"THE WITNESS: We get the network music, and we get some of these promotional pieces like Wallace described, for our public service. As far as we know, the music is cleared at the source of all that.

"Q. (By M. Ronald Murphy) If all performance rights were indicated on the record as cleared, would this—and had a price on it, could you then pick and select the music that you put on your station according to that price?

"A. Oh, yes; that would be very simple, and we would be in a position to pay as we would pay anybody else for anything else, as our credit is good. Our hands are clean, and we would have no objection of we had the choice of what we could play or didn't play. (page 307)

"Q. You have no choice now?

"A. No, not under an ASCAP contract. We pay a percentage of our gross, and to this then we object."

Rogan Jones continued, commencing on page 315, line 19:

"The Witness: My thinking, sir, is that if the music were priced by separate pieces, that some would be more expensive than others and that we could use—we could then trade our position so that we could finally bring the price down to a reasonably equitable basis.

"The Court: Isn't it a fact that the tunes that you do play are the result of public demand? You have to play certain types of tunes; otherwise, people will not listen to your station? (page 315)

"The Witness: Not necessarily, sir.

"The Court: You create the demand yourself?

"The Witness: No, but out of 200 pieces that we play in a given day there are probably 500 pieces that we could have played that day. We have to use our own judgment as to what 200 out of the 500 to play. We do, however, do something that is not customary in the industry. We have a daily, six days a week, six hours a day, survey on an audience of our station and all the stations in the town, and in 48 months we have been number one, 40 months, number two. This we use as a guide in the selection of our music." (page 316)

## APPENDIX "I"

McCANN-ERICKSON, INC.
800 BELL, HOUSTON, TEXAS 77002

February 14, 1964

Commercial Manager
Radio Station KGMJ
Bellingham, Washington

Re: Humble Oil & Refining Company
ASCAP License

Dear Sir:

As you may know, Humble Oil annually buys a spot schedule of 60-second announcements in the summer. This year, some of our commercials to be used will incorporate a composition which requires that all stations using the material be licensed by ASCAP.

We have checked your station listing in the current STANDARD RATE & DATA catalog. Nowhere in your listing is information contained to indicate whether your station is licensed by ASCAP.

Please indicate on the enclosed copy of this letter whether or not you have an ASCAP license, and return the information to this office promptly. Your attention to this matter will be greatly appreciated.

Repeating, your station will not be eligible to be considered for our summer spot scheduling unless you do have an ASCAP license.

Sincerely,

[JANICE MEREDITH (MISS)]
Broadcast Traffic

DO HAVE ASCAP LICENSE................

DO NOT HAVE ASCAP LICENSE................

SIGNED..........................................STATION..................

CAPACITY.......................................DATE........................

McCANN-ERICKSON, INC.
800 BELL, HOUSTON, TEXAS 77002

February 14, 1964

Commercial Manager
Radio Station KWYZ
Everett, Washington

Re: Humble Oil & Refining Company
ASCAP License

Dear Sir:

As you may know, Humble Oil annually buys a spot schedule of 60-second announcements in the summer. This year, some of our commercials to be used will incorporate a composition which requires that all stations using the material be licensed by ASCAP.

We have checked your station listing in the current STANDARD RATE & DATA catalog. Nowhere in your listing is information contained to indicate whether your station is licensed by ASCAP.

Please indicate on the enclosed copy of this letter whether or not you have an ASCAP license, and return the information to this office promptly. Your attention to this matter will be greatly appreciated.

Repeating, your station will not be eligible to be considered for our summer spot scheduling unless you do have an ASCAP license.

Sincerely,

[JANICE MEREDITH (MISS)]
Broadcast Traffic

DO HAVE ASCAP LICENSE................

DO NOT HAVE ASCAP LICENSE................

SIGNED..................................................STATION..................

CAPACITY..............................................DATE.........................